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LYNCHING: HISTORY AND ANALYSIS:

A LEGAL STUDIES MONOGRAPH

Part I: The History of Lynching

Introduction

This monograph results from an interest the author first developed almost fifteen years ago. As part of the preparation for a book on the history of modern liberal thought, I read the volumes of the *New Republic* from the magazine's inception in late 1914 to early 1985. Until the early 1930s there was an annual editorial telling the number of lynchings in the United States.[1]

Two things were surprising about the statistics. The first was that lynching declined year-by-year, virtually disappearing by the end of the 1920s before increasing temporarily in the early 1930s under the impact of the Depression. By the middle of the 1930s the *New Republic* decided there was no longer occasion for an annual report. Lynching's early demise was contrary to the naive impression that it had continued until it was beaten back by the Civil Rights movement after World War II. The second surprising aspect was that lynching had not been confined to the South and simply to black victims. Certainly all Americans know of the "stringing up of desperadoes" in the West; but I had not put the Southern and Western, and even Northeastern, phenomena together. In common with most Americans, I had thought that lynching was preeminently an act of racial viciousness.

These surprises created an interest that caused me to put "a study of lynching" on at least the far back burner of my list of intended projects. Over the years, it has worked itself forward, where now I have undertaken it with far more interest than my initial curiosity foretold.

Why did so morbid a subject grow in interest? Not mainly because of the voyeurism and revulsion it stimulates. There are many books on lynching, and any one is enough to assuage a reader's appetite, such as it may be, for revisiting some of the worst cruelties of the past. That by itself would have turned me away. What has caused my interest to grow has been a realization that lynching raises important unresolved historical issues that are significant in the context of today's social tensions, and a further realization that it

highlights some very genuine questions about the nature of law and justice, ideals and human action.

Until quite recently, I didn't think the article would have a place in the series of studies I have been making of episodes in American history for which Americans of the past are today criticized so severely. That series has studied the historical treatment of the American Indians, the World War II relocation of the Japanese-Americans from the west coast, the Hollywood Blacklist, what happened at Kent State, and the J. Robert Oppenheimer case.[2] Knowing that on each subject there was an abundance of alienated literature, I sought to answer the question of what a careful scholar, conscientious about truth, would say on the subject if he did not approach it with a preformed animus against mainstream American society.

The phenomenon of lynching seemed so clearly indefensible that it offered only a curious side-show. It was a foregone conclusion that lynching demonstrated a viciousness for which nothing can be considered in exculpation. Those who engaged in it were clearly beyond the pale; and I didn't begin my study with any expectation that I would find otherwise.

Needless to say, I have not come to a full reversal of that initial impression. Many lynchings were simple hangings, of people who had committed serious crimes and might therefore be considered to have "gotten what they deserved." But others carried sadism to the outer limits, where fingers and toes were cut off a knuckle at a time, the live victim was castrated, and the person was roasted alive, having only charred stumps for legs by the time he died. What civilized person would remotely want to defend that? In countless ways throughout history and into our own time, human beings have found it within themselves to do the most outrageous things to other human beings, often right alongside much that is decent and good. An important thesis of my book *Understanding the Modern Predicament* is that humanity has risen only partly from prehistoric primitivism.[3] Taken in its entirety, we must marvel at having been born into such a species, to spend our existence as part of such a context. We would throw the whole thing over if it weren't for existential affirmations springing from life itself: the lovely sparkle in our wife's eyes, the delights of our grandson's happy chuckle, and the rising of the mist from the damp logs along a Colorado stream on a summer morning.

I won't seek to defend lynching. But I will ask certain questions of it:

> . What place does it occupy, when seen in perspective? How does it rank among mankind's enormities? How even does it measure up when compared to the outrages to which lynching was often a response? And in the context of a broader perspective, what does it tell us about Americans of earlier generations?
>
> . Was it unique to American history?

. What caused it to disappear? Were "reform" and the "Civil Rights movement" the reasons for its demise, or were these simply the late-arriving midwives to a deeper historical improvement?

.Was lynching primarily--or even significantly--racist? Did it manifest, as so many have contended, a desire born out of hysteria and meanness to "keep blacks in their place"? To Americans today, anything but an affirmative answer seems perverse; but how does the conventional answer hold up as against the heavy weight of counter-evidence?

. What do vigilantism, popular justice and lynching tell us about the nature of justice and of law? And do they contain, even in their cruelty and imperfection, any virtues by which we should measure an organized system of law and police?

. Finally, what are we to think of the chronic disjunction that exists in virtually all areas of life between people's appreciation of ideals, principles and law, on the one hand, and a desire by acting men for a more immediate cutting through of means to ends, on the other? Lynching is just part of a broader fact: that the loyalty to ideals is only partial at best; that people at all times and places find frequent reasons to depart from them, often out of venality and hypocrisy, sometimes out of an indifferent preference for what is more convenient, and sometimes in the service of what the actors themselves consider a higher good.

Individually and together, these are formidable issues. They show that there is more to the subject than is found in a simple denunciation of earlier Americans. With the other subjects in my series of studies I have found reason to deny the grounds for the alienation. I wouldn't entirely do that so far as lynching is concerned, but my study does reveal that there is a complex human context to be understood. In that context, earlier Americans look far less sadistic and racist than so much alienated writing would give us to believe.

We will take up each of these questions later in this monograph. But first it will be important to recount the facts about lynching itself, since the analysis will presuppose that historical background.

Definition of "Lynching"

There are homicides and punitive acts of many kinds, so in order to know what we are talking about in a discussion of lynching we need a definition that differentiates it from riots, assassinations, murders, legal executions and other killings. The intention is not to split hairs, but to limit the subject under discussion and to match the commonly understood meaning of the term. That common usage uses "lynching" to denote something that meets all of the following criteria. It must:

. Be an execution. The word "vigilantism" is broader, and often involves lesser punishments. This element reflects a change in the meaning of "lynching" over time, since early in American history the word referred mainly to floggings.

. Be done outside the processes of established law and court procedure or military action. When the term "legal lynching" is used, it departs from this criterion enough to encompass criminal punishment that is conducted through legal institutions but by a violation of procedural or substantive norms.

. Be committed by several or even many people. "Lynching" is used to refer to group action even though a single individual might act consistently with the other criteria. If killings by one or two individuals had come to be included in the common meaning, the word would have lost much of its clarity, since in many cases it would be almost impossible to know whether the other criteria (such as community approval and a community-oriented motive) were present.

. Be a response to a perceived outrage. In many lynchings, the relation to a serious wrong had a less specific aspect than a criminal charge in a court of law would have. By their very nature, lynch mobs were incapable of weighing niceties of proof and exculpation. But there was another equally important reason for them to disregard those niceties: that the mob acted on the local community's intimate knowledge of the individual. If he was known locally to be vicious or a no-good, that was justification enough for brushing aside "technicalities" when there seemed sufficient reason to think he had committed an outrage. The local community very deliberately did not want to become wrapped up in fine-spun distinctions that it saw as pettifoggeries and that would deny it the immediacy of justice.

. Be motivated by a desire to vindicate the moral sense of the community (or of that part of the community that counts so far as predominant public opinion is concerned). The community was almost always a local one, most often in a rural or small-town setting.

. Enjoy general public approval in fact, at least in the local community. The approval can be apparent in a number of ways, such as by prior announcement of the lynching in the press, the involvement of hundreds or even thousands of people, the condonation by or even participation of public officials, the public display of the body, and the refusal by juries or judges to punish those who did it.

. Have as its target a specific person or persons, rather than being an indiscriminate lashing-out. The word "lynching" isn't used to encompass a riot, even though a lynching can occur in the context of one.

The criminal codes of some states have provided that to qualify as a "lynching" the mob action must have involved taking the person from legal custody. In many cases, mobs stormed the jail and took a prisoner out of his cell or even killed him there. When this is

made part of the definition, the term becomes narrower than general usage today. One of the reform measures in the late nineteenth century was to make local governments liable for penalties if they allowed the lynching of prisoners in their custody. It is likely that this aspect of reform was what introduced the criterion of "taken from legal custody" into the legal definition of lynching in those states.

Lynching in the United States before the Civil War.

There have been a surprising number of men and places named Lynch in the United States, Ireland and England in recent centuries. The word "lynching" has at various times been traced to some punishment inflicted by or at each of them. James Elbert Cutler reviews these origins in the second chapter of his book *Lynch-Law*, although (for reasons he doesn't always make clear) he considers most of the explanations fanciful.[4]

The origin that has gained greatest acceptance centers around Col. Charles Lynch of Bedford County, Virginia, a Quaker and Colonel of Militia. The history that is related is that during the Revolutionary War a good many thieves stole horses and sold them to the British army. The only court for the trial of felonies was two hundred miles away in Williamsburg. In these circumstances, the Colonel's home was by local consensus declared a courthouse. The Colonel served as presiding judge, assisted by three neighbors. The forms of law were followed, and if the accused was convicted he was sentenced "to receive the Law of Moses, which is forty lashes less one, on the bared back." Since most of the thieves were Tories loyal to Britain, a convicted man was made to shout "Liberty forever!" If he refused, he was hung by his thumbs until he complied. After the war, the Virginia legislature ratified all this, enacting "Lynch's Law" granting Col. Lynch and his associates immunity from prosecution and civil suits.[5]

If, however, this was the true origin of the word "lynching," it doesn't mean that there were not forms of popular, extra-legal justice administered at earlier times under other names. Shay explains that during the colonial period informers were seen as "in the service of the crown." When the informer was discovered, his fellow townsmen would whip him, tar and feather him, or "ride him out of town on a rail." Someone who inflicted such a punishment was known as "Squire Birch."[6]

A common practice in New England, Shay says, was for "warners-off" to order a newcomer out of town within five days if his credentials as to "character, religion, goods and other local requirements" didn't appear satisfactory. He faced Squire Birch- type punishment if he disobeyed. Shay tells us, too, that summary punishment was applied to a wide variety of offenders: misbehaving Indians, wife-beaters, chronic drunks, sometimes even non-churchgoers and tobacco smokers.[7]

Cutler tells of popular justice administered against Indians in Pennsylvania in 1763 by Scotch-Irish "Rangers," and says that this was neither an isolated nor the earliest instance.[8]

The period of the American Revolution was one of great turbulence in most communities. Tar-and-feathering was widely used, and the subject was sometimes put to death.[9]

Cutler says the first known use of the term "Lynch Law" was in a book in 1818 (some forty years after Col. Lynch administered his reprisals). A book published in London six years later told of "regulating" in Illinois, Indiana and Kentucky, with bands inflicting punishment. Cutler tells us that "summary and illegal methods of punishing offenders were known under various names between 1780 and 1830." An author of that time wrote that "if a man, whom the public voice has proclaimed a thief or a swindler, escapes justice for want of a legal proof of his guilt, though the law and a jury of his fellow citizens have acquitted him, ten to one he is met with before he can quit the neighborhood, and, tied to a sapling, receives a scourging that marks him for the rest of his life." An author talking about the frontier in Kentucky said that if a second punishment became necessary both the man's ears were cut off.[10]

In 1834 a crowd in what later became Iowa formed a popular tribunal with a jury of twelve to try a man for murder. After he was convicted, the citizens made arrangements to hang and bury him. One was named acting sheriff, and three others collected money to cover expenses. *Niles' Weekly Register* reported that "the whole proceedings were carried on with the utmost regularity and good order." It was at about that time that President Andrew Jackson gave lynching presidential approval by advising Iowa settlers that it was all right to lynch murderers.[11]

In 1835 in Vicksburg, Mississippi, the townspeople turned against the gamblers who dominated the city. A "great mass meeting of indignant citizens," according to Shay, led to a crowd's surrounding a tavern, which in turn led to a shoot-out with the gamblers. After a local doctor was killed in the melee, five of the gamblers were beaten and then hung in doorways. Their bodies were left there for twenty-four hours before they were taken down and buried.[12]

Animosity and conflict increased in the United States during the thirty years preceding the Civil War. Where slavery existed, the punishment of slaves became more frequent and severe, although Cutler says the cases were sporadic and isolated. "The most important thing...is the tendency...toward less reliance on legal procedure and toward greater readiness on the part of the people to take matters into their own hands. The newspapers in the fifties not only frequently excused summary procedure but often openly advocated it."[13]

In 1849 in the Gila River valley in what is now Arizona a murderer was tried by a popular tribunal consisting of an *ad hoc* judge and jury and was executed by a firing squad chosen by lot. There will be more about this sort of frontier tribunal in the section on lynching in the West.[14]

Lynching as execution was already common in Kansas in the 1850s. Cutler quotes a *New York Tribune* correspondent in 1858 that "There is a very general disposition to pass over the helplessly useless forms of Territorial law and corrupt Federal courts, and try these

parties (i.e., horse-thieves) by Lynch law." To this were added lynchings that stemmed from the border wars that flared before the Civil War. In November 1860 militant abolitionists in Kansas hung two men and shot another for returning a runaway slave to his owner in Missouri.[15]

The United States after the Civil War: Overall.

Statistics about lynchings (now referring exclusively to executions) must be taken with caution, since there is little guarantee an accurate count was made. Most of the published statistics were kept from the early 1880s onward, most notably by the *Chicago Tribune* in a compilation published annually on January 1. Cutler cites figures from the *New York Times* for the three-year span 1871-3, but warns in a footnote that "particularly in the case of lynchings in the West they are doubtless incomplete."[16]

We can at least arrive at a rough impression of magnitude. The 1871-3 figures show 48 people lynched in the South, 17 in the West, and ten in the Northeast (figures that seem quite low in light of the facts we will be reviewing). As to the later period, Cutler took the *Chicago Tribune* statistics and adjusted them for errors he found by checking the underlying news reports. His conclusion was that during the 22-year span between 1882 and 1903, inclusive, a total of 3,337 people were lynched. During that period, the numbers per year varied between a low of 97 and a high of 235. Two years stand out as having had considerably more than others: 1884, which Cutler says is explained by vigilante activity in Montana and Colorado; and 1892, attributed to the lynching of blacks in the South. He observes that there was "a general increase in the lynching of negroes from 1882 to 1892, and a general decline" thereafter. A "general but irregular decline in the lynching of whites" began in 1884, eight years earlier. In the West where mostly whites were lynched, the main provocations were murder and theft; in the South where lynching was mainly of blacks, the most common reasons were murder and rape. As to race, the following comparisons apply: In the South, 567 whites, 1985 blacks, and 33 others; in the West, 523 whites, 34 blacks, and 75 others; in the Northeast, 79 whites, 41 blacks, and no others. In all, there were 1,169 whites, 2,060 blacks, and 108 others put to death. As lynchings continued they became increasingly cruel, with torture and burning more frequent, even though such cases were few in number compared to hanging and shooting. (The cruelty was, of course, not really new; the earlier and contemporaneous cutting off of ears, and floggings with as many as 200 lashes, show that the age didn't shrink from inflicting pain.) It may surprise us that of the total who were lynched, 63 were women, of whom 40 were black and 23 white.[17]

Cutler made a meticulous analysis of this data to determine whether there were correlations between the number of lynchings and such factors as (a) the proportion between whites and blacks in a community; (b) the percentage of foreign-born; and (c) the percentage of illiterates (as a measure of the cultural level)-- but he found no meaningful correlations. He concluded that "it is probably true that the distribution of lynchings is largely affected by entirely local conditions, conditions which cannot be represented by statistics." We should take care to note, too, that the enormous increase in the population of the United States, with its impact on per capita figures, isn't taken into

account by a citation of raw numbers. Neither are the comparative amounts of crime at a given time and place, or on a per capita basis. Cutler realized the importance of such facts and attempted to gather crime statistics, but he didn't find a practicable way to do it. Ideally, a number of other variables should be quantified intelligently for sake of comparison, but cannot be, either because the facts aren't available for that time or because they would be virtually unquantifiable in any case. These would include such things as the presence, competence and honesty of an established legal system; the strength of a sense of local community, of an ethos of "honor," of feelings of independence from government and of distance from external authority; etc.[18]

In 1919 the National Association for the Advancement of Colored People (NAACP) published a study of lynching for the thirty-year period between 1889-1918. A comparison with the overlapping data from the *Chicago Tribune*'s and Cutler's analyses shows important differences. For example, for the year 1889 the latter show 176 people lynched and the NAACP shows 175-- virtual agreement; but for 1890, the former show 127 or 128, while the NAACP shows only 91--a considerable difference. For the most part, the NAACP figures are lower than the others. Since the NAACP study tacks on an additional 15 years, it is worth noting that for those years there is a reported total of 1,068. Of these, 124 were of whites and 944 of blacks.[19]

Robert L. Zangrando cites figures for the much longer period of 1882-1968 in his book *The NAACP Crusade Against Lynching, 1909-1950*. Again, his statistics, which he reports were given to him by the Tuskegee Institute, differ somewhat from the other two lists where they overlap. His total figure for 1890, say, is 96, with 11 being white and 85 black. The NAACP's report of 91 was based on 3 whites and 88 blacks. So we again have reason to take the specifics with caution. Just the same, the order of magnitude is indicated by his 87-year total of 4,742, of which 1,297 were white and 3,445 black. Of equal significance is the declining numbers shown over the years: prior to 1902, there was only one year (1890) with less than 100; prior to 1923, only one year ((1917) with less than 50; prior to 1932, no years with less than 10. But after a brief increase in 1933, 1934 and 1935, there were always less than ten, and the list dwindles slowly to zero. *In effect, lynching ceased to be a major phenomenon by the turn of the century, and had pretty much come to an end by the mid-1930s.* If, too, it were seen on a per capita basis in light of total population, the decline would be even more dramatic. (The population of the United States doubled from 30 million in 1860 to 60 million in 1890.) The decline came first in the West and Northeast, and soon thereafter in the South.[20]

The decline was accompanied by a vast change in public sentiment. Frontier conditions, the backwash of the unspeakable carnage of the Civil War, the savageries of the Indian wars, and the earthiness of a mainly agricultural society all combined in the second half of the nineteenth century to produce an insensitivity to pain and a cheapness of life that is incomprehensible to us in the much more settled and urban civilization a cemtury and more later (which is something we can still say about the mainstream of American society despite the rising barbarism that threatens to swamp it). Richard Maxwell Brown tells how "as late as 1891...in the frontier community of Rawlins, Wyoming, a leading citizen, Dr. John E. Osborne--a future governor of Wyoming--participated in the vigilante

hanging of the ferocious bandit, George (Big Nose) Parrott. The next day Dr. Osborne 'skinned...George and cut away the top of the skull, in order to remove the brain. The skin was tanned and made into a medical instrument bag, razor strops, a pair of lady's shoes, and a tobacco pouch. The shoes were displayed in the Rawlins National Bank for years.'" Those were rough and ready times, and the fact that the shoes were accepted objects of curiosity for so long shows that an absence of empathy was part of the community ethos.[21]

Lynching has long-since died out, but press reports for 1993 are reminders that people in various contexts, with varying justifications, express violent collective disapproval. An Associated Press report on July 13, 1993, told of the arson burning of the house of a man in Washington state; he had just been released after serving a mere 18 months for the statutory rape of a ten year old girl, and there had been an angry rally of residents. Another Associated Press report three days later told that a crowd of 25 women and children in Chicago chased a man and beat him to death after he "grabbed a woman's purse in a high-crime neighborhood." A New York Times News Service story on October 23, 1993, told of the attack that was made on Fidel Lopez, an immigrant from Guatemala, during the 1992 Los Angeles riot: "Lopez was dragged from his truck and beaten senseless by a mob...His forehead was slashed under the blows of a stereo speaker. His left ear was nearly severed. His genitals were spray-painted black, and his body was doused with gasoline, apparently for the purpose of setting him afire. A black preacher threw his body upon Lopez's and saved his life." The legal aftermath showed official condonation: the main attacker was convicted only of "misdemeanor assault." And the National Right to Work Newsletter for October 1993 shows a picture of a Wyoming union official wearing a t-shirt with the words "Scab Hunter" and the picture of a fist gripping a revolver. The picture accompanies a report that in West Virginia "on July 22, an unidentified sniper took aim and fired a bullet into the base of Eddie York's brain." York had been "working in West Virginia's coal fields during a strike." It would appear that no statistics are kept on all of this, which means that such incidents are lost in the realm of the "anecdotal." But they must be kept in mind when we seek to place the historic phenomenon of "lynching" into perspective. [22]

The United States: the West both before and after the Civil War

The frontier conditions of the American West make it likely that any statistic that tells the number of lynchings is stating only a minimum, without assurance about what the upper limit might have been. Subject to this caution, we note that the Time-Life Books' volume *The Wild West* says that "by the end of the [nineteenth] century, Western vigilantes had put some 700 alleged criminals to death."[23]

Lynching was common in the West before the Civil War, which means that the *New York Times* figures for 1871-3 are for a relatively late period in the process. They show five in California, two in Montana, two in Nevada, two in Nebraska, four in Kansas, and two in Colorado. Cutler's table reports 632 for the still later 22 years between 1882 and 1903. Of these, 523 were white, 34 black, and 75 of other races.[24]

The historian Hubert Howe Bancroft devoted two volumes of his work, amounting to 1500 pages, to the West's "popular tribunals." John W. Caughey says that "the frontier avengers commonly punished by whipping. Thirty-nine lashes...were the most favored number, but sometimes they applied 75 or 100 or even 200." He adds that they doubted that a whipping would deter a criminal, and therefore branded him or cut off an ear to make him recognizable. But the punishment was often death, as is apparent when Caughey says that "throughout the diggings [in California] the miners meted out off-the-cuff trial and punishment. In the performance in 1849 that gave Hangtown its name, in the sadistic execution of Juanita in Downieville in 1851, and in a hundred other cases they, as Bancroft put it, left 'the quiet oaks tasselled with the carcasses of the wicked.'"[25]

The same description could just as well be applied to Kansas in the 1860s. Caughey quotes from the Kansas Historical Society collections: "In the early days [the old oak bridge over the Neosho River at Council Grove] furnished a convenient scaffold from which to drop those sentenced to death by the court of Judge Lynch, which often held sessions here. The last execution to take place here was during the winter of 1866-67. Jack McDowell was a noted horsethief and outlaw from Missouri...." An 1870 book by Fitz Hugh Ludlow reports that in Atchison, Kansas, a crowd of almost 2,000 men, women and children watched the trial and hanging of a man who (with a companion who was hung two days later) had terrorized, beaten and robbed a farm family. Shay says that in Idaho "men and women came great distances to witness the executions of five, ten, and even twenty robbers and murderers."[26]

"Vigilance Committees" were common and were organized to varying degrees. Shay says that in 1864 the *New York Times* reported that they existed "throughout the mineral territories." Richard Maxwell Brown reports 19 such movements in Kansas between 1858 and 1889. The best known and perhaps largest were the San Francisco Vigilance Committees of 1851 and 1856. The 1856 movement grew in membership to between 6,000 and 8,000 members, and was dominated, Brown says, "by the leading merchants of the city." A gambler shot and killed the U.S. Marshal in late 1855, but the gambler's trial resulted in a hung jury. When the local newspaper ran stinging editorials, its editor was shot dead. The leading merchants immediately organized the vigilance committee and hung the two killers. Within a three-month period, it hung two more and expelled 28 others, breaking the back of the corrupt political machine that had controlled the city. The Committee held a grand parade, disbanded, and turned itself into a political party that governed San Francisco for the next decade. Further south, Los Angeles was a far rougher cow town, which had figuratively "a murder a day." There, the lynchings "far exceeded" the much tamer actions of the San Francisco committee, according to Caughey. In one instance, the city's mayor resigned his position so that he could head a lynch mob, which stormed the jail to remove and then hang an inmate. (When the inmate objected to being hung by Mexicans, the Americans in the crowd took the rope and did it.)[27]

Brown tells us that in 1884 a "vigilante movement of northern and eastern Montana" executed 35, and that between 1880 and 1896 a movement in San Saba county, Texas, lynched 25. He says there were major vigilante movements in Las Vegas, Socorro (New

Mexico), Seattle, northern Nebraska, southern Missouri, the Creek Nation (in what is now Oklahoma), New Orleans, Tennessee, and Wyoming.[28]

A thoughtful article by UCLA history professor Roger D. McGrath in the January 1994 *Chronicles* gives a graphic picture of popular justice in two mining camps, Aurora, Nevada, and Bodie, California. At their height, each town had more than 5,000 inhabitants and "contained dozens of saloons and brothels, and produced gold and silver bullion worth a billion in today's dollars." And yet, contrary to the perception Hollywood has created for twentieth century Americans, there was "far less crime and far fewer innocent victims than America has today...A statistical comparison of these rowdy mining camps with modern American cities demonstrates that today's cities, such as Detroit, New York, and Miami, have 20 times as much robbery per capita." He says that "women, often the target of criminals today, suffered only rarely from violence in Aurora and Bodie. Prostitutes bore the brunt of the little violence that did occur." There was so little crime, McGrath says, because the respectable citizens defended themselves. Homeowners and merchants went armed. And "when an innocent victim was shot down in cold blood, only once in Aurora and once in Bodie, then the response of the citizenry was immediate and took the form of vigilantism...Contrary to the popular image of vigilantes as an angry, unruly mob, the vigilantes displayed military-like organization and discipline...They did what they thought they had a right to do, defend their community."[29]

The United States: the South after the Civil War

Several factors are particularly relevant to understanding the lynching in the South between the end of the Civil War and the virtual disappearance of lynching after 1935:

1. The South lived through the aftermath of one of history's most horrific wars. This aftermath took the form of chaos and a low-grade simmering conflict, both because of the devastation and dislocation inherent in a losing military struggle and in the emancipation of a large slave population, and because of the military Reconstruction that imposed hostile rule on the Southern states.

Thomas D. Clark and Albert D. Kirwan say in *The South Since Appomattox* that "southern soldiers found impoverished and exhausted communities with no employment to offer: their homesteads destroyed, their farms devastated, their families in distress." They continue: "To the material destruction must be added the social disorder. Emancipation of the slaves had for the time demoralized the labor system...More portentous than property destruction was the loss in human resources. A quarter-million of the youngest and ablest men of the region had their lives prematurely snuffed out, and countless others were maimed in body and spirit."[30]

2. Much of the South was at the same time in a frontier-like economic and social condition. Clark and Kirwan cite a startling statistic: "For at least two decades following the Civil War the South was still frontier country...Vast areas of the region's landed domain remained untouched...Only 13 per cent of the entire acreage [was] open to

cultivation. Not more than five per cent of this available land was cultivated annually." Much of the land was covered by "primitive forests."[31]

3. War and frontier-like conditions produced a cheapening of life. To understand this dehumanization, it would be necessary to put oneself into the conditions of the time to an extent that is virtually impossible for us today.

4. The white population, despite its defeat, possessed a fierce spirit made up of several reenforcing elements: of localism; of community; of defiance of (and, later, freedom from) external authority; of a tradition of independence and self-sufficiency; of "honor" as a cultural system calling upon each man to defend himself and his family and community; of quiet despair over defeat and of determination about the imperative to reestablish as quickly and as securely as possible the foundations of civilized order.

As to the latter of these points, many twentieth century writers, speaking in a "politically correct" tone in keeping with

Americans' all-encompassing and yet mentally very narrow egalitarianism, deride white Southerners as having wanted to "keep blacks in their place" and to "maintain white supremacy." Here, their ideology blinds them. They fail to see two things that should be obvious:

a. Most conspicuously, civilization itself, with all that it entails for everyone involved, white and black together, could not be restored and maintained if the white society were swamped by that of millions of people who had just emerged from slavery, with all that that entailed. Although this is a truism, it had no appeal to the radical Reconstructionists in Congress; and their blindness to it made much worse the tragedies that followed the war.

b. What is not so obvious, but must have been vitally important to Southern whites, is that the civilization of the South--meaning the white civilization that had existed before the Civil War and that had its roots in Europe--would not have been willing to submerge itself in an ocean of black culture and thus cease to exist, *even if* the blacks *had* on the whole been at a comparable level of education and culture. The white South had not lost its will to exist. Because mainstream Americans in the late twentieth century largely *have* lost a will to maintain a nation based largely on their own identity, this is something our contemporaries are unwilling to understand. To declare the white South's will to exist "racist" is simply to declare hostility to a given people and culture.

5. Of course, one cannot overlook the fact that the defeated South contained the millions of newly-freed blacks, who at first maintained the habits of discipline that had been inculcated into them during slavery, but who, as time went on and a new generation emerged, began to lose those habits. E. Merton Coulter, in his *The South During Reconstruction, 1865-1877*, writes that "slavery left the Negro illiterate and untrained for the responsibilities of freedom, with such weaknesses as lying and thieving exaggerated.

He loved idleness, he had no keen conception of right and wrong, and he was 'improvident to the last degree of childishness.'"[32]

A concomitant, of course, was an overflowing of black crime, much of it petty but a great deal of it so serious as to amount almost to a reign of terror. In 1901 a college president in North Carolina, George T. Winston, wrote of "a whole community...frenzied with horror." In 1893 while sentencing a young black to death for murder, a judge in Georgia told the defendant that the black race "has many noble men and women who are exemplars in living upright, honest lives," but that "I regret to notice that members of your race commit so many atrocious crimes, particularly among the younger class, some of which seem to be extremely vicious and hard-hearted." Since these may seem merely self-serving observations by whites, it is important to note that the black leader W. E. B. DuBois spoke of "a class of black criminals, loafers, and ne'er-do-wells who are a menace to their fellows, both black and white." In his book *Racial Violence in Kentucky, 1865-1940*, George C. Wright reports that "when investigating lynchings in the early 1900s, Ray Stannard Baker, an 'enlightened progressive,' clearly blamed Afro-Americans for the lynchings resorted to by whites. In both the North and the South, he said, 'I found that this floating, worthless negro caused most of the trouble.' Their crimes were marked by an almost 'animal-like ferocity.'"[33]

6. No external authority weighed on the members of local communities. During Reconstruction, the South struggled against the overpowering external authority of the national government; then for many years after that there was no outside pressure from the national government and almost none from state governments, with the result that local communities had almost complete autonomy to act as they wished. Their citizens felt they could act with impunity so long as local sentiment approved. A lynching announced in advance by the newspapers, attended by as many as 20,000 people, participated in by elected officials and in effect ratified by them afterwards both because they agreed with the prevailing opinion and because they wanted to be reelected amounted, really, to the most direct and primitive expression of democracy. There was no external authority, governmental or intellectual, to tell the great majority what it ought to do with its autonomous power. (Ironically, this total local sovereignty is similar to what Lenin had in mind for a "communist" society after "the state had withered away." In *State and Revolution* Lenin wrote that "only communism renders the state absolutely unnecessary...We are not utopians, and we do not in the least deny the possibility and inevitability of excesses on the part of individual persons, nor the need to suppress such excesses. But...no special machinery, no special apparatus of repression is needed for this; this will be done by the armed people itself, as simply and as readily as any crowd of civilized people, even in modern society, parts a pair of combatants or does not allow a woman to be outraged.")[34]

In the South the factors we have listed came together to form a society *in extremis*, but containing within itself a life-force prepared to defend its right to live. At first, the most obvious collective violence struck at military Reconstruction and black militias. The (first) Ku Klux Klan, led by the "famed Confederate cavalry leader Nathan Bedford Forrest," was organized in direct response to Reconstruction, Clark and Kirwan tell us.

They say that "as the radical program unfolded, Klan aims were directed not at enforcing the law but at its frustration. It sought to accomplish its purpose by suppressing Negro militia units and frightening Negroes from support of the radicals." Later, it reflected a struggle for existence until society could be reestablished and had had time to rise to a level at which the impulses to vigilantism would slowly die out. That largely occurred within 35 years, but took an additional 35 years to be complete.[35]

Most authors consider the period between 1885 and 1900 the high-point of lynchings, but in his book on racial violence in Kentucky George C. Wright disputes this: "My figures show that more lynchings occurred in the fifteen-year period from 1865 to 1880 than during any other fifteen-year period, even the years from 1885-1900, which most scholars and contemporary observers called the heyday of lynching." He cites Richard Maxwell Brown as mentioning "over 400 Klan lynchings" between 1868 and 1871," and adds that "as astonishing as it is, [this] greatly undercounts the lynchings that took place. More than [*sic*] one- third of the total number of lynchings that occurred in Kentucky (117 of 353) happened between 1865 and 1874."[36]

There were important episodes that contradict the usual image of southern white-on-black lynching. Vigilante justice was meted out liberally in the Ozarks from 1839 onward without regard to race. Mary Hartman and Elmo Ingenthron have written *Bald Knobbers: Vigilantes on the Ozarks Frontier*, and say that "it started in 1839 when thirty-six Cane Hill, Arkansas, citizens captured, 'tried,' and lynched four murderers." Then after the Civil War "crime and violence exploded." In the 24 years immediately prior to the Civil War, Taney county in southwest Missouri had only three murders; but "between 1865 and 1885, murderers killed between thirty and forty victims. If a sheriff gave chase, the felon slipped across the adjacent Arkansas border or west into Indian Territory... Consequently, few suspects stood trial, and all but one received acquittals from juries stacked with kinfolk and allies." It was after one such acquittal in 1884 that the Taney county "Bald Knobbers" (named after a treeless mountain they met on) were formed, with a membership that grew to 1,000. Contrary to the expectation that would be likely today, the Bald Knobbers were formed by northern elements, "mostly conservative Republicans and former Unionists," while those who argued for the "rule of law" and recourse to the regular courts were "equally respectable men" who were "mostly made up of Democrats and former Confederate soldiers." Similar movements took place in Christian and Douglas counties. The leader of the Taney county Bald Knobbers voiced his opposition to widespread immorality, corruption and unpunished violence, saying "it became a war between civilization and barbarism!" There isn't a definitive summary in Hartman and Ingenthron of the actions taken by the Bald Knobbers, but here is some indication from what they relate: "The Anti-Bald Knobbers tallied the grim casualties: between fifteen and eighteen men dead; three men and three women shot and wounded; two women and uncounted numbers of men brutally whipped." One opponent is quoted as saying that the Bald Knobbers [in Taney county alone] may have killed "more than thirty men and at least four women." The movements were short-lived, lasting approximately three years. Their demise was due in part to the presence of an opposition, which resulted in several indictments against members, and to the absence of pure local

autonomy. A "vigorous federal probe" through U. S. district courts made it dangerous to participate.[37]

Another example that contradicts the image occurred in New Orleans. Eleven members of a "Mafia faction of immigrant Italian dock workers," according to Richard Maxwell Brown, were lynched in 1891. They were thought to have murdered the chief of police, but were acquitted by a jury. When the public concluded that the jury had been tampered with, a mass meeting was announced in the newspaper. Some of the suspects were shot while attempting to get away; others were hung "before a throng of thousands." The lynching was participated in by city officials, was supported by all of New Orleans' papers, and had, according to the *New York Times*, the public's unanimous approval.[38]

White southerners often attributed the lynching of blacks to the terror whites had of black rapists. Most of the writers on lynching treat this fear as a "myth." In Jacquelyn Dowd Hall's *Revolt Against Chivalry*, for example, the view is expressed that "this southern 'rape complex' was never founded on objective reality. Of the known victims of lynch mobs in the period 1882-1946, only 23 percent were accused of rape or attempted rape." Edward L. Ayres in *Vengeance and Justice* says that "whites, it seems fair to say, did not know they were battling a foe of their own creation." Nevertheless, as Ayres himself shows, white commentators discounted the "myth" characterization, holding that the black-on-white rape was both very real and a key to understanding the lynchings. Ayres quotes a certain Clarence H. Poe: "To say that men are lynched for other crimes than that against white women, and that therefore lynching cannot be attributed to it, is to be more plausible than accurate. It is with this crime that lynching begins; here and here only could the furious mob spirit break through the resisting wall of law and order. Once through, it does not stop."[39]

The United States: the Northeast after the Civil War

As we've seen, lynching was not exclusively a southern phenomenon, but took place in a much broader context. That context included lynchings in the northeastern United States (or what I will call "the northeast" to differentiate it from the South and the West). Cutler's table shows that between 1882-1903 there were 52 in Indiana, 21 in Ohio, 21 in Illinois, 8 in Michigan, 7 in Pennsylvania, 6 in Wisconsin, 2 in New York, and one each in New Jersey, Connecticut and Delaware. Of this total of 120, 79 were of whites, 41 of blacks. Murder or rape was the provocation for almost all of them.[40]

Among the many books I read in preparing this monograph, one of the best, since it brings considerable sociology and philosophy to bear in a thoughtful way, is Dennis B. Downey and Raymond M. Hyser's *No Crooked Death: Coatesville, Pennsylvania, and the Lynching of Zachariah Walker*. It tells of the lynching that occurred on August 13, 1911, in a small steel-mill town in southeastern Pennsylvania. The town had undergone rapid change as the steel mills brought in black and immigrant workers. What had been a quiet, peaceful community became frontier-like: "Drunks jeered and made gestures at passersby... Native white residents, angered by the decline in civility and the increase in arrests, violent crime, and property damage, avoided the shopping district...." A family of

four had been murdered the preceding September and a non-English-speaking immigrant had been charged with the crime.

It was in the context of this "siege mentality" that Zachariah Walker, a black who had come to Coatesville from Virginia and who lived in "a collection of shacks that passed as homes on a bluff overlooking the sprawling steel mills," got drunk, shot at two immigrant workers, and then shot and killed Edgar Rice, a white security officer for one of the mills (arguably in "self-defense" when the officer tried to arrest him, although that smacks of sophistry). The next day, virtually the entire white community became involved in a manhunt for the killer, visited the widow and her four children, and viewed the body. After Walker's arrest, a crowd of from 4- to 5,000 people formed, pulled Walker out of a hospital in which he was being treated for injuries, and burned him alive. There was a "huge roar of approval," but otherwise the crowd, consisting of men, women and children, was "polite and well-mannered." Walker crawled out of the fire several times but was beaten, tied with ropes, and forced back into it. The policeman's widow regretted that friends and family didn't allow her to see the lynching, saying that "I wanted to apply the match." On August 17 an estimated 6,000 people attended Rice's funeral. In the aftermath the lynching was condemned by virtually all media outside the local community, but public opinion in Chester county, where Coatesville is located, supported it. Criminal charges were brought against several of the leaders, but the trials resulted in acquittals.[41]

Part II: Issues of perspective

Was lynching unique to American history?

As part of the hostile cultural critique of American society that rose to a crescendo in the 1960s and that continues in important sectors today, but that has existed within our intellectual culture since as long ago as the 1820s, it is common to say that the United States "has a history of violence" that explains why our crime rate is higher than in, say, Europe or Japan. This perception has long been expressed in the literature about lynching, where the conventional wisdom is that lynching is unique to the American people. Cutler began his 1905 book *Lynch-Law* with precisely this view: "It has been said that our country's national crime is lynching. We may be reluctant to admit our peculiarity in this respect and it may seem unpatriotic to do so, but the fact remains that lynching is a criminal practice which is peculiar to the United States...[It] is to be found in no other country of a high degree of civilization."[1]

The reader will notice the qualification expressed in the last few words. By definition, one can say that lynching and a high degree of civilization do not go together, if part of what we mean by civilization (as we should) is an orderly society founded upon law. His qualification is a hedge that allowed him to give less importance to a good many counter-examples from other cultures.

Just two pages later Cutler tells of lynching in nineteenth century Russia: "The Russian law provides only a light punishment for horse-stealing, and, since the peasant's horse is

almost his only property and is his chief instrument of labor, summary methods seem necessary in order to check the veritable plague of horse-stealing...When a thief is caught, the common way is for the men of the village to club him to death...Another method is to tie the criminal by the feet to the tail of a young and active colt which is then ridden at a gallop until little is left of the horse-thief. There is also the method of execution whereby the thief is bound hand and foot...and the women of the village thrust needles...[into him] until death ensues." He distinguished the Russian situation from that in the United States by saying that it "is found in the loosely organized society of the peasants in the rural districts." But, of course, that is no distinction at all.[2]

Although Cutler then argued that "nothing like lynch-law can be said to prevail in Europe," he followed this by saying that "occasionally mobs put persons to death who have committed some brutal and outrageous crime." He cited how a man had recently (in 1902) been lynched in Hungary after he deliberately burned his wife, parents and three sisters to death. "A similar report tells of the lynching of a Bohemian village schoolmaster...." Referring to China, Cutler mentioned the "secret tribunals for thieves and robbers." He pointed back, too, to the *Vehmgerichte* in feudal Germany, a highly organized series of popular tribunals that "afforded some protection against the outrages of the princes and nobles"; "lynch-law in the United States has never been administered by an organization so perfect and extensive as that of the Vehmic courts."[3]

Shay provides similar evidence: "Summary justice has been meted to individuals throughout history. There are isolated instances in modern Europe, but these bear the stamp of genuinely spontaneous action on the part of the people who, outraged by his criminality, fell upon the offender and put him to death." He, too, tells of the *Vehmgerichte*, and adds that "the Lydford laws, gibbet or Halifax law, Cowper and Jeddart justice, and the Scotch burlaw bear a strong resemblance to our Frontier Justice...All these practices originated in a genuine and popular need and through the lack of regularly constituted law courts."[4]

Today, "popular justice" flourishes in several parts of the world where for one reason or another society is unsettled:

> . David Weisburd's 1989 book *Jewish Settler Violence: Deviance as Social Reaction* tells in sociological terms about vigilantism, in which death is sometimes inflicted, by Jewish settlers in the Gush Emunim settlements on the West Bank. "Settler vigilantism was a community-supported strategy of control in which a large number of settlers participated... Settlers argued that it was necessary for them to take the law into their own hands because the military government...failed to provide sufficient protection from Arab law-breaking...The Zionist belief in self-reliance also played an important part in legitimizing settler vigilantism...Few settlers were arrested for vigilante acts and none interviewed in this study received any significant sanctions...Settlement communities shielded vigilantes from prosecution." Since his book appeared, a press report for September 28, 1993, has told that "the Judean Police, a group of Jewish vigilantes in the occupied West Bank, vowed Monday that they would shoot on sight all

members of the Palestinian police force now being created under the Israel-PLO peace agreement." As to the Arab side, there is a press report on December 25, 1993, from the Gaza Strip: "'We control these streets,' said Tafish, 24, a local leader of the Fatah Hawks, the military wing of Yasser Arafat's faction in the Palestine Liberation Organization...We make the laws and punish the offenders."[5]

. Brazil today makes any part of nineteenth century America look tame. An Associated Press story on August 25, 1991, told how "Brazilians fed up with rampant crime and turnstile justice have turned to vigilantism, forming lynch mobs and killing suspects in record numbers. No exact figures are available, but *some officials say more than 500 people will die in lynch-mob executions in 1991*, three times more than any previous year [emphasis added]. National attention was focused on lynchings last November 23, when 5,000 residents of Matupa...attacked three prisoners in a police car. The three had just been arrested for trying to rob a rancher's home and holding three women and four children hostage. In the space of two hours, the mob beat the three men with metal rods and rocks, poured gasoline on them and burned them alive...In January, 1,500 people stormed a jail in Andira...and tried to kill two prisoners accused of killing a taxi driver."[6] A press report on December 5, 1993, says that in Rio de Janeiro, where "the city has registered more than 3,000 homicides a year since 1989," there was a front-page photo in September 1993 of "a man being burned in a bonfire by residents of the neighborhood after he was identified as the person who had torched a house, killing an infant girl. A tree limb had been inserted into his body."[7]

. Another press report on the same day told how "people's courts" had sprung up among blacks in South Africa prior to the election of Mandela: "In the absence of any legitimate mechanism of law enforcement in the [black] townships, a private culture of street justice and people's courts has evolved...They feel like they are doing something for the community if they kill a criminal figure or a member of an opposition faction."

. An Associated Press story on January 4, 1994, told how "thousands of youths disappeared in Sri Lanka in 1989 and 1990. They were allegedly killed by government-sponsored vigilante groups that crushed a two-year anti-government campaign by Sinhalese nationalists."[8]

. Although a debate over prosecution of a hitherto hidden war crime doesn't literally fit into the context of lynchings, a news story on January 1, 1994, shows that even with so civilized a people as the British in the 1990s there are many of the impulses discussed here. A debate was raging about whether paratroopers who were heroes of the Falklands War should be prosecuted. "In 1991, Lance Cpl. Vincent Bramley, a machine-gunner with the Third Battalion, published his memoirs...In his book, Bramley detailed two incidents...in which unnamed comrades allegedly shot four [Argentine] prisoners after they surrendered..., cutting off ears for trophies." The editor of the London *Daily Telegraph* has

> argued, the report says, that it is "lunacy" and a "betrayal of our heroes" to prosecute the soldiers, while "other voices have been raised in defense of British justice."[9]

From all of this if would be difficult not to conclude that community-condoned extralegal violence in nineteenth and early twentieth century America was in no way unique. The "good and decent" people of that day were not substantially different from similar people everywhere, who will assert themselves with great energy and even cruelty if sufficiently outraged.

Was lynching essentially, or even significantly, "racist"?

Countless authors have drummed home a major point about lynching. It is that "southern lynching was a vicious act of racism calculated to 'keep blacks in their place.'" It is only after an extensive historical review of vigilantism that we are prepared to see how mistaken--in fact, how ideologically warped--this assessment is.

Here are some examples of the charge:

> . By Jacquelyn Dowd Hall in *Revolt Against Chivalry* (1993): "Lynching functioned as a mode of repression because it was arbitrary and exemplary, aimed not at one individual but at blacks as a group. White supremacy was maintained...and lynching worked effectively to create a general milieu of fear that discouraged individual and organized black assertiveness."[10]
>
> . By Arthur F. Raper in *The Tragedy of Lynching* (1933): "It is not surprising to find the mass of whites ready to justify any and all means used to 'keep the Negro in his place.'"[11]
>
> . By Dennis B. Downey and Raymond M. Hyser in *No Crooked Death* (1991): "For whites, lynchings were a means by which to reassert the ethos of white supremacy." In the context of the Coatesville lynching of Zachariah Walker, "the lynching forged a hitherto unknown unity among the disparate elements of this industrial community's white population."[12]
>
> . By Donald L. Grant in *The Anti-Lynching Movement: 1883- 1932* (1975): "Lynching...became the most effective method of maintaining the racial caste system which developed after Reconstruction. This caste system relegated Blacks to the position of a conquered people and made it possible for whites to receive the economic, psychological, and sexual tribute which they had been conditioned by slavery to expect as their due."[13]
>
> . By Robert L. Zangrando in *The NAACP Crusade Against Lynching, 1909-1950* (1980): "It was the indiscriminate use of violence that gave the mob its real utility as an instrument of intimidation and control in a racist society."[14]

> . Such generalizations expressing an alienation against American society become the common coinage of the media. An example is the Los Angeles Times/Washington Post story on October 25, 1992, about the 1963 murder of civil rights activist Medgar Evers. The article says that "between 1881 and 1966, there were 4,709 lynchings in the United States, most of them racially motivated killings of Southern blacks...."[15] [Notice that the statistic given for this generalization is not the smaller one for southern lynchings, but the larger one that includes those in the West and the Northeast. It is odd that the larger, far less relevant, figure would be cited, but it certainly served the article's polemical purpose.]

From a scholarly point of view, those who write such assertions should feel obligated to support them with evidence and argument. Instead, they have counted on an intuitive connection based on the coexistence of two facts: that the lynching of blacks occurred, and that southern whites were "racist." (In the world since World War II, "racism" has come to be seen as a matter of pure evil, although that assessment is applied almost entirely to Caucasians and is not applied equally to the racial preferences of other ethnicities.)

That both of these elements, lynching and racism, existed cannot be doubted. But it is a *post hoc* fallacy to conclude that southern "racism" was the cause of the lynching of blacks. To assert the connection, it is necessary to argue that "*but for* the existence of racism, the lynching, or at least a significant part of it, would not have occurred." (This is the "but-for test" that juries are instructed to use to determine causation in tort cases.) To establish this clearly, those asserting the thesis would do well to negate the presence of any other cause sufficient to explain the lynchings. Although there can be two or more simultaneous causes of something, each of which would meet the "but-for test" if it were operating alone, the proof of one is made considerably more difficult by the presence of the other. In addition, those making the conventional point need to rebut the many counter-examples that show that southerners often acted in ways that the "racist" hypothesis would not predict. Those things directly contradict the generalization.

Do the critics of the South do this? One searches the very extensive literature in vain looking for it. The literature is polemical, occasionally scientistic in the context of the social sciences, sometimes even analytical about peripheral issues, but it never questions or seeks to justify its central supposition: that blacks were lynched because of their race. The dialogue about these things is not over, so it is not too late to issue a scholarly invitation to others to argue the point and provide the evidence. The burden of historical persuasion, however, is on the person who asserts a causal connection.

There is, of course, a major alternative explanation for the lynching of blacks, and that is the crime that was so widespread and outrageous. I won't repeat the facts cited earlier. It is sufficient to notice that Cutler, who is even one of those who asserts the racial hypothesis, quotes with favor a statement that "the worst instincts of the negro came to the front; the percentage of criminals among negroes increased to an alarming extent; many were guilty of crimes of violence of the most heinous and repulsive kind." Arthur

F. Raper, another who asserts a racial linkage, gives the comparative murder rates: "In 1921-22, the homicide rates in Atlanta, Birmingham, Memphis, and New Orleans per 100,000 Negro population were 103.2, 97.2, 116.9, and 46.7 respectively, while the corresponding rates for the white population were 15.0, 28.0, 29.6, and 8.4." These figures are eloquent testimony that serious crime was the primary provocation for lynching.[16] If those murder rates had existed in the post-Civil War West, the perpetrators, whatever their race, might well have expected to swing from the bridge over the Neosho river.

The only linkage to racism that is persuasive, albeit only in part, is in the cases where a lynching occurred without an outrageous provoking cause. Jane Addams and Ida B. Wells, in *Lynching and Rape: An Exchange of Views*, refer extensively to the *Chicago Tribune* statistics and point out that cases are cited of negroes' having been lynched for "violating contracts, unpopularity, testifying in court, or shooting at rabbits." Cutler makes the same point to explain why the *Tribune* listed some lynchings as caused by "race prejudice": "The probable reason...is that no offense had been committed which was considered worthy of mention as a cause." It seems sensible that if there was no genuine provocation (although we should keep it in mind that the local community may have perceived the preceding events differently than a *Chicago Tribune* compiler did), the lynching must have been caused by the other main potential motivating factor, race prejudice. This is persuasive to a point. The weakness in it lies, however, in there having been *whites* who were also lynched for "minor offenses." If race was the cause, how is that to be explained?[17]

This doubt is deepened when we take into account all of the counter-evidence that militates against the racism-as-cause explanation. Here is the rebutting evidence I have noticed:

1. Some may not credit it because it can be taken as a self-serving statement by a white southerner, but to me there is significance in what Henry W. Grady, perhaps the major exponent of the white South's perspective during the last decades of the nineteenth century, was able to write in *Century Magazine* in 1884. What he wrote must have rung true to his readers, at least from their perspective, since if it were known to them to be nonsense his article would have had little persuasive value. He was talking about the treatment blacks received in southern courts, but it has a bearing on the nature of the "prejudice" that is said to have animated whites: "There is an abundant belief that the very helplessness of the negro in court has touched the heart and conscience of many a jury, when the facts should have held them impervious. In the city in which this is written a negro, at midnight, on an unfrequented street, murdered a popular young fellow...The only witnesses of the killing were the friends of the murdered boy. Had the murderer been a white man, it is believed he would have been convicted. He was acquitted by the white jury, and has since been convicted of a murderous assault on a person of his own color. Similarly, a young white man, belonging to one of the leading families of the State, was hanged for the murder of a negro."[18]

2. It is especially worthwhile to notice the last sentence of the quote just given from Grady, which tells that a white man, even one of prominent social standing, was executed for killing a black. This is inconceivable to the proponents of the racial thesis. It also runs counter to a Marxist class analysis.

3. The lynching in the South was not limited to blacks. Whites, and even white women, were lynched, too, obviously not for reasons of racial prejudice. Cutler's statistics show 567 whites lynched in the South between 1882-1903, inclusive. When other parts of the country are included, Zangrando's statistics indicate 1,297 whites between 1882 and 1968. A famous case of a white man's being lynched is the August 1915 lynching of Leo Frank in Georgia after he was convicted of rape-murder. Wright tells how in eastern Kentucky in 1868 nineteen supporters of the Republican Party, apparently all white, were murdered within a four-month period. He says that even though a number of whites were killed for this reason relating to the aftermath of the Civil War, murder was the most frequent provocation. He mentions a white who was lynched for murdering his mother-in-law, another for killing his wife. In 1877 five members of the Simmons gang, all white, were taken from their jail cells and lynched. In the 1880s, several vigilante committees were formed to catch and lynch outlaws. We recall that the Bald Knobbers in southwest Missouri involved white-on-white vigilantism, including lynchings. Richard Maxwell Brown tells of the White Cap movement (another of the many names for vigilantism) that "first appeared in southern Indiana in 1887, but...spread to the four corners of the nation...[W]hite capping was the most prevalent as a sort of spontaneous movement for the moral regulation of the poor whites and ne'er-do-wells of the rural American countryside. Thus, drunken, shiftless whites who often abused their families were typical targets of White Cap violence." This was a movement directed at what in those days respectable society called "white trash." If all of this went on and was *not* racially motivated, why are we to conclude that blacks were lynched for a totally different reason?[19]

4. In Tennessee in 1911, according to Shay, four white men "lynched" a black and his two daughters with no known provocation. "Two of the white men were ultimately hanged for their part in the lynching." [In light of the meaning of "lynching," what Shay is talking about is a case of murder and not of lynching, since the act was not done as an expression of community sensibility and did not receive community approval.] If indiscriminate anti-black racial brutality had been part of the community ethos, the white men would not have been executed.[20]

5. Wright says "there were cases of *blacks* being lynched by *whites* for the murder of *blacks*" (emphasis added). This is totally incongruous if one accepts the racial hypothesis, since according to it whites would have welcomed blacks' murdering of other blacks.[21]

6. Blacks did some of the lynching themselves, sometimes of other blacks, sometimes of whites. Shay says that "in 1908, at Pine Level, Johnston County, North Carolina, it is recorded that an unnamed Negro entertainer was lynched by Negroes for putting on a poor show." [Notice, too, that the lynching here was for insufficient provocation, which when done by whites is taken as evidence of their racial motivation.] Another case cited

by Shay occurred at Caddo Parish, Louisiana, in 1934 when "a thirty-year- old Negro was beaten to death by members of his own race because of an alleged insult offered by [him] to a colored girl...." Most significant is the case in Clarksdale, Tennessee, in 1914, "when Negroes...lynched a white youth for the rape of a Negress. *The coroner's jury, believe it or not, brought in a verdict of justifiable homicide and freed the blacks"* (emphasis added). Shay's exclamatory "believe it or not" underscores how greatly the white coroner's jury's action contradicts the conventional wisdom. The historian E. Merton Coulter tells how "in Chicot County, Arkansas, in 1872 armed negroes took three white men from jail, riddled them with bullets, and went about burning and pillaging." This shows that it wasn't just white mobs that succeeded in getting people from the custody of jailers.[22]

7. We might surmise that someone propounding the conventional theory that "racism was the cause" would suppose that there would have been more lynching of blacks in Mississippi, considered a notoriously "racist" state, than in Kansas, where at the beginning of the Civil War anti-slavery forces prevailed over the pro-slavery faction. It is surprising, then, that Donald L. Grant tells us that "the number of lynchings per thousand Blacks in Kansas during the 1890s was practically the same as in Mississippi."[23]

8. The most important refutation of the racism explanation lies in southern lynching's place as just part of a much larger mosaic of turmoil and popular justice, such as occurred in colonial America, in the entire country before the Civil War, in the West, in the Northeast, and in the world at large whenever society is unsettled. It is extremely arbitrary and selective to consider the lynching of *blacks* in the *South* just by itself, dropping the larger context. Seen just by itself, the racial hypothesis seems plausible, which is why readers quite gullibly accept the charge; but seen as part of a larger phenomenon *occurring at exactly the same time*, it comes to share in the explanations that are appropriate to the phenomenon as a whole.

9. The refutation needs to be on the merits of the argument, and on that basis the refutation holds up well. But once that is established, an *ad hominem* observation is not out of order. It is that there are ideological, political and organizational reasons for the insistence on the racism hypothesis (which, if we were to adopt the belittling semantic so often used by the Left, we would now label a "myth"). Zangrando tells us that "the fight against lynching offered the NAACP a ready means of appealing for new members and financial assistance."[24] It is no wonder that the anti-lynching campaign continued long after the phenomenon itself withered and died. And in the United States since the early 1960s, various forces have been nourished precisely by keeping ever-fresh the blacks' collective sense of grievance.

Did the civil rights movement cause the disappearance of lynching?

A common feature of modern social legislation has involved another *post hoc* fallacy. During the very period when an evil is disappearing because of an improvement in the economic level or a change in the condition of society, public campaigns are waged and laws are passed for the evil's abolition. As the evil disappears, the agitation and

legislation are assigned the credit. This was true with child labor, the disappearance of which was due to a long-term secular trend away from agriculture and to rising economic well-being. Child labor was praised in the 1830s while it was still necessary, but as families became able to dispense with it, it faded out. In most people's minds the early-twentieth century campaign against child labor, resulting in legal prohibitions, is credited with having eliminated it, but that is almost entirely an illusion. While families still needed their children to work, there was no way to get the state legislatures to abolish it.

The same illusion was present in the relationship between industrial accidents and OSHA (the Occupational Safety and Health Act); the number of industrial accidents was on the decline for several years before the legislation was passed.

This misunderstanding also occurs about lynching. Zangrando is typical of much writing on the subject when he says "as opposition mounted in the 1920s and 1930s, the number of reported lynchings declined." Again: "The steady decline...reflected the [NAACP's] success in making the issue one of national concern...." Donald L. Grant speaks of "the very success of the reform in reducing the number of lynchings from a high of 230 in 1892 to a low of eight in 1932...."[25]

It is much more accurate to say as Raper did in 1933 that "lynchings will ultimately fade from the scene with the general rise in the cultural level." Indeed, it was virtually at the end of doing so when he wrote. Cutler told of the state anti-lynching laws that were passed, and then added that "it is difficult to point out in what way these laws have brought about a decrease... [A] marked decline in the number of lynchings per year began several years before the greater number of anti-lynching laws were enacted."[26]

The anti-lynching movement of the late nineteenth and early twentieth centuries can reasonably be credited with at least some minor causal role, however, as a mid-wife to already-existing trends. An aspect of lynching was total local autonomy, and as lynchings became an issue at the state and federal level that autonomy disappeared. (We should take care to realize, however, that local autonomy was disappearing for a variety of other reasons, too.) Another aspect was a supportive local consensus. Local opinion did not continue to support lynching once there was a general societal consensus against it. The anti-lynching movement was at least the outward manifestation of that developing national sensibility.

Needless to say, the post-World War II civil rights movement had nothing to do with the demise of lynching, which had virtually disappeared by the mid-1930s.

How great an enormity was lynching when seen in historical perspective?

At Coatesville, to Zachariah Walker and to Edgar Rice and his widow and four children, historical perspective was irrelevant. But in a scholarly context it amounts to a distortion of truth not to put lynching into perspective by seeing it in context. Its magnitude needs to be understood in comparison to other historical facts:

1. The discussions above of whether lynching was unique to American history and of whether lynching was "racist" bear directly on the question of perspective.

2. In terms of the numbers of lives taken, lynching was minor when compared to many of the enormities committed in almost any century, and most especially in the twentieth. Zangrando, we've seen, has given the total as 4,742 people for 1882-1968. It appears that many lynchings in the West went unreported and that there is probably a major undercounting for the South for the decade right after the Civil War. Entirely arbitrarily, solely for the purpose of gaining perspective, let us multiply that number by more than five to make the total 25,000 over the 70 years between the end of the Civil War in 1865 and the dying-out of lynching in 1935. Let us then consider the fact that most of the killings were a local community's direct response to a monstrous act of murder, rape, or other spoliation first committed by the person lynched. In the moral balance, the provoking crime by the person lynched must surely have an off-setting weight of some sort. If this is taken into account, the total takes on a considerably diminished significance. If we had a way to remember the victims of those who were lynched and to gauge their suffering, we might even find that the balance was not adequately redressed by the punishments that were inflicted, although this can hardly be true where lynching was by burning and torture.

Compare the resulting diminished number, whatever the reader concludes it to be, with the press reports of June 1, 1994, that 20,000 bodies were found in a single convent in Rwanda, hacked to death in the reciprocal genocides being committed in that country. Or compare it to the 10- to 15,000 Polish officers executed by the Soviets in the Katyn Forest. We know that Stalin cut off the food supplies to the Ukraine and other places in the Soviet Union in the winter of 1932-33, starving an estimated seven to nine million people to death in a deliberate act of state policy. And Public Television belatedly tells us of a hitherto unknown 30,000,000 (30 million!) Chinese who were starved to death, again as a matter of state policy, under Mao in the early 1960s. These events have hardly received a ripple of attention from a world distracted by its on-going concerns; and, perhaps more significantly, academia has devoted almost no attention to them. Today's American society sometimes takes a partisan position in favor of things just as heinous. For years, the United States and the world at large supported the African National Congress (ANC) in its drive for power in South Africa, while fully informed that burning people alive through "necklacing" was a deliberate ANC policy. *Newsweek* on June 2, 1986, told among other things of a 62-year-old woman, Mary Skhosana, who screamed for mercy while she was forced to drink gasoline and was burned to death with a gas-filled tire around her neck. Along the same lines, the United States has in the 1990s supported a return to power in Haiti by President Jean-Bertrand Aristide even though his "nine-month reign was marked by unmitigated terror, including the 'necklacing' of political opponents," according Accuracy in Media's *AIM Report*. The *Report* quotes Aristide as saying in a radio address that "the people have their...little matches in their hand, they have their little gasoline not too far away." We should consider these things as we seek to assess the weight to give to lynching in comparison to other enormities in world history.[27]

3. Part of our revulsion comes from the supposition, which is presumptively justified in light of the absence of legal proof of the provoking crimes, that at least some innocent people were lynched. If some were, they were true victims. But if we seek perspective we will realize that their agony does not count more than the agony of the victims of the thousands of individually committed murders that occur every year, or than that of the tens of thousands of highway victims killed by drunk drivers, about which we have almost no concern. (A press clipping tells of a German tourist in Miami who was "robbed, beaten and run over in front of her mother and two children." Surely she counts equally with any of the innocent victims of lynching. With this in mind, the many writings that excoriate the "history of violence" in the United States, using lynching as their prime example, are to be understood as ideological magnifying glasses; they exploit wrongs for essentially political and social purposes, making them larger than other wrongs of equal or greater magnitude.

4. Another reason for revulsion is that lynching flies so apparently in the face of established legal process. To the extent it undermines the ideals of law and of due process, lynching undermines one of the fundamentals of civilization. That is primarily what makes lynching so great a blot on a society that professes high ideals and that has in fact served as a beacon to the world.

When this monograph discusses the relationship of lynching and law to justice, however, we will see that there is much more to it. It will become apparent lynching's flaunting of law and justice was far less than is usually assumed; and that the commitment to justice by established legal institutions often departs greatly from the ideal. Instead of two poles with lynching at one end and legal institutions at the other, there is a complex continuum. Legal institutions must themselves be scrutinized on an on-going basis to see whether they even roughly approximate the ideal. Such an understanding won't vindicate lynching, but it will again help put lynching into perspective.

Part III:

What Lynching Says About Justice and Law

How do lynching and legal institutions relate to justice?

What I have found most interesting about this study of lynching is that it has caused me to pursue certain thoughts about the nature of justice and of law. The very idea of "popular justice" provokes questions that are both profound and immensely practical. Humanity commonly means two quite different things by "justice," and mixes them without clarity. One of these relates to the *actual* truth and demands of a situation without taking into account the need for human perception and interpretation of it; the other relates to the *process* by which people in society determine the truth of an occurrence and portion out just desserts based on the truth as they come to see it. It should be apparent that these are two very different things, even though the latter attempts to replicate the former. If we think of justice as *actual* justice, we will think that a person is treated

unjustly if he is punished for something he didn't do even if he was given the benefit of the most scrupulous and impartial procedure. If, on the other hand, we think of justice as what results from a fair process, we will consider a man to have received justice even if the process misperceives the true facts, so long as every element of "due process" was extended to him.

Although confusion can and often does arise from a failure to see the difference, any form of humanly-arrived-at justice can at least be conceptually measured by the demands of actual justice. For that reason, in this part of the monograph I wish to examine

. the idea and characteristics of actual justice,

. the nature of law and legal institutions as a form of *mediated* justice (i.e., one that is based on a reconstruction of reality after the fact by the means available),

. the nature of "popular justice" that acts more spontaneously but nevertheless does not escape the need to perceive and interpret,

. the strengths and defects of both systems (which will be considered as part of discussing the nature of each),

. the miserable situation the United States finds itself in in the late twentieth century so far as its law and legal institutions are concerned, and

. what "popular justice" has to say about how a system of regularized, mediated justice can be made to match more closely the demands of actual justice.

The idea and characteristics of actual justice or "justice in esse." Let us suppose that two cars are approaching an intersection, and that the Ford has the green light and the Chevrolet the red. They enter the intersection and collide. The occupants of both cars are killed, and there are no witnesses. Since neither driver attempted to stop, there are no skidmarks.

The event had reality. Even the most committed solipsist can see that the smoking remains are there, the ambulances, the dead bodies. In that reality, let us suppose further, the Ford had the green light, and thus the right to go, and the other the red. In that reality, there is clear fault in the absence of other relevant facts such as the Chevrolet's driver's having had a heart attack as he approached the intersection.

Not all realities will be that clear; some are complex, and the justice of the matter, even if taken directly without mediation, is not clear-cut. In a marriage that has lasted many years, for example, the reality of the relationship between husband and wife is composed not of something that could be captured in a snapshot but of a flow of minutes, hours, days, weeks, months and years. That flow of time has been filled not just by objective facts, but by subjective realities within each of the people. We simplify it more or less stupidly by speaking of just parts of it: that the wife stabbed and killed the husband; that

she did so because he was brutal to her; that he was brutal because of his rage over her infidelity; that she was unfaithful because he paid no attention to her; that he...etc. In such a matter, it is a gross oversimplification to speak of one "actual reality" leading to "actual justice." I don't wish to interject an unwholesome relativism, but complexity far beyond the ken of anyone to understand is something that moral philosophers need to take into account.

Nevertheless, one might say that if he had a direct perception of the true reality, he would do such-and-such. He would seek to act justly, giving each person his "just desserts." That idea, however, like the moon on a humid night, has a halo of ambiguity. What are "just desserts" *actually*, and not merely through the mediation of mankind's applying norms that are designed to fit many cases and may not fully meet the imperatives of a given reality? As with Heisenberg's atom that moves when he attempts to see it through a microscope, a moral philosopher will find that *actual* justice is virtually unknowable to human beings, precisely because we have no choice but to think and to act through a system of perception and interpretation. It would take something like Plato's theory of ideal forms, refined to a splendid degree, to come to grips with it.

That direct justice--the justice that only an all-seeing God would be prepared to declare--we might call "actual justice" or "justice *in esse*" (i.e., in actual reality).

The nature of law and legal institutions as a form of mediated justice. A civilized society seeks to regularize the process by which facts and causation are determined, harm assessed, and remedies or punishment are meted out. This is a social process undertaken after the events have transpired, and one of the most important things to realize about it is that the determination of all those things is based not directly on what happened, since that is impossible, but on a reconstruction of that reality through witnesses and demonstrative evidence of various kinds.

The actual reality of what happened is an ontological fact; the human inquiry into that reality is primarily of an epistemological nature involving the question of how we know, through reconstruction, what that reality was.

As it makes this reconstruction, a civilized society seeks to provide "due process," which is an impartial procedure that treats all relevant persons fairly, hearing their evidence and arguments. It seeks, too, to follow pre-established norms that the parties and everyone in the process can know in advance and use to guide their conduct. Not only does this make the law a helpful guide; it does something more: it limits the power of government, which is restrained when government must act according to norms applying equally to "all like cases." Friedrich Hayek's book *The Constitution of Liberty* is the best discussion I know of of the service that the "Rule of Law" provides mankind. (I am aware, of course, that many varied proponents of the active state have attacked this conception of law, but that is another issue for another time.)

This procedural justice becomes the norm for justice within society. If carried out fully in accord with its letter and spirit, it is the best mankind can do. Because of this, a man who

is sentenced to spend the rest of his life in prison *for something he didn't do, but who has received full due process* in the determination of his guilt and the assessment of the punishment, has no more reason to be bitter at his fellow men for the waste of his life than he would have for being hit by lightning. He has received the full measure of *mediated* justice even though his imprisonment is totally unjust *in esse*.

We may not often think about it, but this regularized procedure of due process has certain characteristics because of its very nature that carry it rather far afield from realizing justice *in esse*. Here are some of the ways:

1. "Due process of law" is unavoidably time-consuming because of the imperatives of informing the defendant or the accused of the charges, giving him time to be advised and to answer, determining any questions of jurisdiction and venue, allowing procedures for "discovery" to permit each side to gather the facts, holding the trial, and giving an opportunity to appeal. Taken together, this cannot be compressed into too brief a span without sacrificing essential elements of fairness and of objective adjudication.

2. Since in any important matter there will need to be professional participation by people trained in the system, it is expensive. It hardly seems necessary to illustrate how delay and expense can deny justice and create new injustices of their own.

3. The "reconstruction" of reality is enormously fallible, depending on the availability and nature of evidence. In the automobile accident example I deliberately stated the facts in a way to show that a reconstruction may be impossible. In such a case, the party with the "burden of proof" should lose. Such a ruling is a purely formal resolution of the issues for human purposes, and has nothing whatsoever to do with the reality of what happened; i.e., to justice *in esse*.

Witnesses vary from acute accuracy to complete misperception. I am reminded of an instance when my daughter and I were returning home from her ballet class. She was driving and I was in the passenger seat next to her. As we approached an intersection, we saw two fast-moving cars almost collide. My daughter thought that one of them had the green light; I, the other. I remember thinking that since my daughter was driving, she most likely had been more attentive; it was probable that she was right and I wrong. Questions about this have since run through my mind: If the cars had collided, should I have made my statement to the police, directly contradicting my daughter's, which would have gone far toward denying a remedy to either side in court since there would have been two conflicting impartial eyewitnesses? Or should I, in trying to serve the purposes of justice through a resolution that would have the greatest probability of matching what happened in fact (*in esse*), have suppressed my own perception and have either said I didn't see what happened or have gone so far as to confirm my daughter's perception? (If I had done the latter, I might have swung the case conclusively in favor of the party who was at fault and against the one who was in the right, since there is the possibility--even though of lesser probability--that my, and not my daughter's, perception of who had the green light was correct.) Our legal system, committed so completely as it is to "justice as fair process," would answer these questions with an unequivocal "you should tell the

truth as you saw it." What we should notice, though, is that the law's self-assurance on this point is based on an overall notion of what will make possible the best reconstruction of reality in most cases, and has nothing directly to do with what "actual justice" might have demanded in this specific case. Not even my daughter and I know with certainty which of us was right, and hence what "actual justice" demanded.

To say it another way: the trial of a case in an adversarial system, or an inquiry by neutral inquisitors in a non-adversarial system, involves a *mediated* forming of a picture of reality. It is reality-once-removed, based on inference and nuance.

4. Another aspect is that a fair procedure seeking a reconstruction of what happened introduces a considerable element of distance. Rather than being the "thing itself," it is a vicarious process. Things are play-acted on a stage, and become increasingly divorced from the reality that is being explored. One of the great virtues of the film based on Truman Capote's book *In Cold Blood* is that through the use of flashbacks it brings the brutality of the murders into direct counterpoise with the hanging of the killers. But this doesn't happen in real life, except in such moments as when photos of the victims are shown to the jury; as the weeks, months and years go by, the event becomes increasingly distant. There is no immediacy. This means that much of the human meaning is drained away. I was struck by this while watching the preliminary hearing in the O. J. Simpson murder case. There was a moment of levity in which the lawyers and the judge were laughing. This was entirely appropriate, even beneficial, to the civility by which a case should be tried as a rational explication of evidence and argument. But it bore no relation to the reality of what happened to Nicole Simpson, whose slit throat and partially cut spinal cord almost amounted to her decapitation, or to the other victim of the butchery, Ronald Coleman. Nor did it bear any relation to the fate of the defendant, which is a crucially serious matter to him. The court process is one human reality; the event itself, and the punishment or other aftermath, something very different.

Along the same lines of detachment and distance is the fact that bureaucratic process comes to bear: the whole enormous apparatus of judges, prosecutors, defense lawyers, court reporters, clerks, social workers, jailers, probation officers. These are people to whom the case--any case--is necessarily one among many. The reconstructive search to achieve justice that is as close as possible to justice *in esse* stands still for a coffee break.

From all of this it is possible to see that what a legal system gains in objectivity and detachment, it at least partly loses through a serious loss of vitality.

5. Many of what we consider the best protections of our criminal law are derivatives of this fact of distance. Legal procedure in the United States derives its ideals (although not always its spirit) from Blackstone's well-known admonition that it is better to let 99 guilty men go free than to punish one innocent man. This orientation leads directly to the rule that proof of guilt must be "beyond a reasonable doubt"; to the requirement of a unanimous verdict, not just of a finding by a majority or two-thirds or even three-fourths of the jurors; and to the "exclusionary rule" that for the past several decades in the United States has barred the admission of evidence if a search was done without a warrant when

the law says there should have been one. We are accustomed to counting these as legal blessings. We don't even think of their costs in terms of their effect on justice *in esse*. We forget that to let 99 guilty men go free is to let 99 victims go unrequited. It is an easy thing to say, "let 99 guilty go free"; we think only of the agony of the one innocent man who might otherwise be convicted, thinking "there but for the grace of God go I," and somehow we forget about the victims of the crime. When a legal system pulls the process away from the victims, it inevitably depersonalizes it; and we see how easy it becomes, through facile legal ideology, to leave the victims' cry for justice frozen on their lips.

6. We must count it among the "inevitable" characteristics of legal institutions that they involve the "human factor." Legal institutions are social entities suitable for study by the techniques of sociology and psychology. It is true that the effects of this can vary because of many things, but within a broad range there are the vagaries of courthouse politics, of egos, of ideology and the part-truths of anyone's conventional wisdom, of fads and fashions, of biases, of prejudices, often of corruption and venality, of personality (such as is involved in the presence or absence of "judicial temperament"), of budget constraints with their impact on staffing and plea bargaining and sentencing, etc., etc. These factors introduce so great a cancer into the American legal system that I have been thankful to be a law professor and to be able to come into contact with the system only peripherally through a part time practice. I even received a taste of this while I was still in law school. We learned in class that the state of Colorado had a "strong public policy" against gambling; but when the bar association held its annual buffet dinner it followed it with a massive gambling session in which lawyers and public officials allowed themselves to do what the law prohibited to everybody else. It was an eye-opener; it showed me the devaluation of their commitment to the ideals of law and equal justice. Their willingness to do that in part reflected the cultural decadence that has afflicted twentieth century America, but to a great extent it reflected, too, the unwillingness of human beings to be constrained more than a little by their ideals, which is something I will talk about at the conclusion of this monograph.

7. In the context of criminal law, which is the context most relevant to lynching, we see that the vicariousness, the distance, the bureaucratic inevitabilities, all combine to move the system away from the immediacy of retribution. Punishment, when it comes, is not inflicted in an angry spasm by those who feel most directly the pain of the crime. It comes much later at the hands of professionals to whom it is a job and who really know nothing of the particular emotions that demand retribution in the given case. The ideology of the Left and the sentimentality that goes to extremes in modern America (as in England in Macaulay's day) have given rise to a body of thought that argues that "punishment" and "retribution" should not be part of the process at all, since they are "unworthy" of civilized society. This amounts to breaking totally the connection between the criminal's atrocity and the social processes that are thrown into motion by the crime. The process becomes bloodless and pale, and seeks to ignore entirely the gore of the victim. "Deterrence" looks ahead to the possibility of future victims, whom it very rightly seeks to prevent; "rehabilitation" looks ahead to the hoped-for well-being of the criminal himself and of the society that someday will become host to him again. Neither looks back to justice *in esse* and seeks "just desserts" based on the reality of the past.

But this is intolerable to human beings. It violates everything they sense about the nature of equity. "Equity is equality," the maxim reads. After a crime, this demands action to even the balance, to have people feel that "he got as well as he gave." In fact, something extra needs to be added to the scales on his side; it was he as the criminal, after all, who initiated the whole destructive process by committing the wrong, and that in itself needs to be redressed.

The move away from retribution, both through the vicariousness of the process and the ideology that denies a role to retribution, leads toward both good and bad outcomes. On the good side, it reduces the potential for cruelty; in a system with Constitutional constraints against "cruel and unusual punishments" there will be no torture and burning alive. On the bad side, it tends toward condonation. It isn't surprising that in case after case criminals are let out of jail long before the public thinks they should be. The whole thing leads toward forgetting the crime, treating it as a figment from a distant past or as a "throwaway" because "it can't be undone anyway." This then allows a non-retributive process to focus more than it otherwise would on the redemptive potential of the criminal (which recidivism often shows to have been wishful thinking).

8. Another characteristic of the law is that it tends to address particular, discrete acts rather than to look into the broader situation. I have often told university classes that the "reasonably prudent person" test for negligence is actually a perfectionist test in that it looks only to what the defendant did in the one or two seconds immediately preceding an accident. It allows him no ordinary human fallibility during that truncated time-frame, which is the one relevant to the causation of the harm. The test does not have the jury ask whether the defendant is, taken as a whole over a span of time, a careful or a negligent driver. None of that counts. The only thing that is relevant is what led to the particular accident.

To do otherwise would be to give judges and juries wide- ranging power; and we find good reason not to trust legal institutions, or government in general, with that sort of discretion. (So we see how one of the forces among the many that form our legal institutions is our very fear of government.) A court case thus becomes an inquiry into a static piece, a snapshot, of reality. We deliberately say that "whether the defendant is a 'bad man' is irrelevant to whether he committed the particular crime with which he is charged." Vigilante justice doesn't do that.

Another reason for limiting the reconstruction to a specific act or finite series of actions is that the reconstruction of reality in a courtroom simply doesn't lend itself to a grasp of a complex, on-going human reality. A fine example of this appears in the movie "Kramer v. Kramer" where the character played by Dustin Hoffman appears to a judge to be an incompetent parent because his son hurt himself in a fall at a playground. The audience seeing the entire movie knows that the fall was just a small part of the whole reality, and that the character Hoffman plays is really a caring, competent father. The court's perception, based on a discrete fragment, is very different from a perception based on the totality.

9. So far, what I have said has stressed the distance, impersonality, and potentially flawed nature of legal process. Since I will be comparing legal institutions to "popular justice" as it appeared in lynching, it should be noted that, for all their potential detachment, legal institutions can in many circumstances become caught up in the same passions that actuate a lynch mob. There is nothing about "going to court" that guarantees that the mediated justice that occurs there is anything but a sham. Even where it is not a sham, various strains of vigilantism may lurk just under the surface. Passion, pressure from the community in which judges and jurors must continue to live after the case is over, and commonly held attitudes shared as much by those who conduct the legal process as by outside members of the community--none are necessarily lost just because "the law is left to run its course." We know that lynching is precipitous and devoid of safeguards against error and disproportionate action; but the imperfections of legal institutions can encompass these things, too, as well as many other flaws. (This is not to argue, of course, that the balance, at least in an advanced society, comes out in favor of lynching and against "due process.")

10. Finally, we should note something that is often overlooked, which is that legal process is suitable for some things but not for others. Where it best fits is in a settled, civilized community where there are few infractions and it is possible to give a "full dress" hearing that hears only the "best evidence" and acts upon an assumption of the dignity of each of the participants. We readily see that it doesn't fit war, where it is imperative to shoot at the soldiers of the other army with no regard to individual hearings to determine whether each is there voluntarily and actually intends to fire his weapon.

It is a sign of our overall lack of wisdom, however, that other unsuitabilities aren't apparent to us. In recent years in the United States we have been oblivious to the fact that many wrongs done in human relationships are best considered "non-justiciable" if we care at all about the expansion of state interference into our lives. By a series of legislation, we have outlawed discrimination where any part of the motive is based on race, creed, national origin, sex, etc.; and there is pressure to extend the list of "protected categories." Prohibitions that touch hundreds of thousands, perhaps tens of millions, of transactions will, if given more than the merest token enforcement, involve courts and government in all of our lives all of the time. We could do literally nothing else. We are protected from this in part by our hypocrisy; the laws are on the books but the enforcement, fortunately for society in general, is far from what it could be. The very existence of these ubiquitously-defined wrongs, however, makes all of our lives and property insecure. Every real estate broker, every landlord, every employer, can be sued at any time and subjected to damage awards so large as to strip him of his life savings. Property, savings, industrious effort are all made as insecure as if we lived under an oriental potentate.

Southerners after the Civil War raised the question of whether full-dress legal process was truly suited to containing the flood of barbarism. Whether that was true is hard for us to say; it is easier for us to judge what can be done about the flood of barbarism that threatens us today. When I was in law practice full time and doing some criminal defense work, I once had a client sitting across the desk from me and we were talking about what

to put in the application for probation. "Tell me anything good about yourself," I said, explaining that I had known him only a short time. He couldn't think of anything. So I prompted him, "What hobbies do you have? What interests? Any friends who can say you're a good guy? A minister of a church you've attended? A teacher who knows and likes you?" As to each of these, nothing. In his eyes across the desk I could see the passive indifference of spiritual and intellectual emptiness. He was "in but not of" the civilized community, as the saying goes. If there are a great many like him, which from all indications we know there are, their presence can become like an ocean that no channel can contain. When we recall the crowd of women and children who beat a purse-snatcher to death in Chicago last year, and we think about what motivated them, we come face-to-face with human realities that overflow the banks of "the law."[1]

The nature of "popular justice." We shouldn't confuse "popular" or "vigilante" justice with what I have called "actual justice" or "justice *in esse*." Vigilante action may be swift and powerful, but it still constitutes human action after the event. Its great weakness is that it concerns itself much less than established legal procedures do with the epistemological question. Even when it imitates legal procedure as many of the "vigilance committees" did, it has no fully appropriate structure for an impartial judgment. To an incalculable extent, this increases its potential for acting contrary to the requirements of actual justice.

This has broad ramifications in communities where vigilante action occurs. In concept, it makes everybody's life insecure, since anyone could be seized by a mob and given no meaningful chance to respond. It is probable that in practice, however, this general insecurity rarely existed in the American context, since the great majority of people who shared the sensibilities of the community knew intuitively that they were "on the right side of things" and weren't genuinely threatened with a turning of the tables. This is especially true about lynching in the strict sense of the word, where the actors act on behalf of what they understand the sense of the community to be and the community does indeed demonstrate its approval. It would be important to know whether upstanding members of the black community felt insecure, since they would in some ways have been within the fold of the predominant community and in other ways outside it.

As we speak of "local communities," it is important to keep in mind that their own understanding and motives can vary widely. If the community wants to safeguard the rights and property of individuals and of families, that is one thing; and that is what seems to have occurred in most of the lynchings we have studied in the West, in the South, in Coatesville, in nineteenth century Russia, and in Brazil today. If, however, the community acts from collective ideology or self-serving motives (such as through envy or in economic disputes), that is something else. Let us imagine a community in which ninety percent of the people believe in a certain political philosophy and are willing to put to death anyone who professes any other. Another example comes from my own recollection. While I was in Marine Corps boot camp, much fun was had by a sizeable group of the men in the platoon (the relevant "community" at that place) who grabbed a fellow they considered a weakling and took him into the shower where they scrubbed his skin raw with laundry brushes. Their excuse, that he hadn't showered, was a mere

fabrication; their behavior was unmitigated, exuberant sadism. Groups as well as individuals can be sadist; and they are not always "the good people in the community acting together."

The common definition of "lynching" excludes murders by individuals or mobs acting without community approval, even if the murderer kills out of an arguably justifiable desire "for justice." Those killings raise other questions, but aren't what we are talking about in a discussion of vigilantism or popular justice (which I treat as within the framework of lynching even though the punishment is sometimes less than death).

Our discussion of popular justice won't be complete without a review of its attributes, good and bad (even though the review will need to reiterate some points already made). Here are the thoughts that seem most to the point:

1. Unless the vigilantes are unrepresentative, the activity is democratic, expressing the will of the community in the most direct sense. Since, however, no orderly determination of its representative quality is made, such as through elections, its "democratic" aspect is roughhewn (which, by the way, is of no particular concern to thinkers and cultures who do not seek a "rationalistic" organization of society). In the case of the Bald Knobbers in southwest Missouri, the community was divided into two factions, with the Bald Knobbers representing only one of them. We can well imagine that an anti-vigilante faction would grow in almost any community in which there were a continuing tendency to bypass the regular legal system (assuming one existed and were considered honest and competent). Unstructured and relatively spontaneous, vigilantism is not something that can be rationalized into a system of justice.

2. Vigilantism is direct, primal, participative, distinctly *not* vicarious. As such, it satisfies some elemental needs.

3. It is often based on strong moral feeling.

4. There are at least two reasons it often goes deeply into cruelty, even into sadism. One is that those acting want both to make a moral point and to "set an example" in the strongest possible way, expressing their outrage. Another is that the "worst elements" sometimes step in to perform the actual violence. Much lynching was done soberly and with discipline, but there was much that was not. These factors led in many cases to a dehumanization of the person lynched, so that he was no longer seen as deserving pity. Hatred turned him into an object.

5. It is motivated by allegiance to the immediate community and gives little weight to abstract concepts. Philosopher John Nelson, who was one of my professors at the University of Colorado forty years ago, has written me citing such things as the tarring-and-feathering and riding-out-of-town-on-a-rail of the state attorney in Colorado early in this century, concluding that "I see in these cases an allegiance, more ancient by far than that to a government and its agencies of legislation and law enforcement, to ones own society and its determination of right and wrong." Lynching represented the most

complete local autonomy, with an assumed immunity from outside judgment and punishment. This mostly arose out of the circumstances of the day, but it also reflected a long tradition and ethos of local sovereignty, self-reliance, and distrust for central authority. It was reenforced by a culture of "honor" that imposed on men a responsibility to defend themselves and those close to them.[2] Moreover, it gave expression to a belief in a higher law that made regular legal institutions seem weak by comparison. We can see from all these things that there are vast philosophical traditions, continuing within much of the world's thinking even today, that support the values it embodied.

6. It seeks retribution above all else, with deterrence a close second. Lynchings had no rehabilitative aspect. Whippings may have.

7. Despite its nobler motives, the spasmodic violence almost unavoidably picks up a variety of more sordid motives. No doubt it is true to say as H. L. Mencken did that it had a sporting element, providing exhilarating entertainment for some; there is no assurance that personal motives and interests could not enter in; and the violence could be a vehicle for sadism and racial prejudice, which are aspects I have discussed.

8. It can either run contrary to established legal institutions or be seen by the community as supplementing them. The two have not in all cases been antagonistic.

9. It is not given to delay and expense, as the law is; nor to bureaucratism, technicalities, sophistries, and courthouse politics. It is strong and "sure"--but with nothing other than the community sense to guarantee that it is right. Since that community sense is based on a rapid flaring of emotion (although perhaps after a long-suffering awareness of the problem that has come to a head in the particular outrage), we have no way of knowing that it is not more prone to error than a court would be.

10. Popular justice is based more on an overall sense of the evil-doer than a court's judgment is. The community knows the individual and already assesses him as vicious; or it distrusts him as a stranger. This is part of what lies behind its willingness to dispatch him cruelly without rigorous safeguards. The community precisely does not want any interposition of technical defenses. Dennis B. Downey's book on the Coatesville lynching of Zachariah Walker observes that a lawyer for Walker might have argued that Edgar Rice, as part of the steel-mill security personnel, had no jurisdiction to try to arrest Walker after he shot at the two immigrants; and that accordingly Walker had an arguable claim of self-defense. This is an excellent example of the sort of legal pettifoggery the community wished to have no patience for. To the people of Coatesville, Walker was representative of the barbarism undermining the life of the community, he had caused himself to become drunk, he was armed and threatening the lives of innocent people, and anyone who cared about the values he threatened had not only a right but an obligation to try to stop him. They stood full-square behind Rice's attempted arrest, and their sympathies were 100% with Rice's widow and family after he was killed. If a court had had a chance to entertain an argument of "self-defense" on Walker's behalf, the court would have been concerning itself with a separate issue relating to the powers of private security personnel. That question is not an improper one, but we can see that it is

divorced from the immediate focus of the Coatesville community. One of the strengths of a regularized system of law is that the system takes into account the many considerations that are important to society but that aren't of immediate interest in the aftermath of an outrage. It is, at the same time, a weakness.

11. Where society is in disarray, popular justice may be the only kind of justice obtainable, and hence the only bulwark against an otherwise unmanageable tidalwave of crime. If there is no law, what is the community to do? Would it have been better in the towns of the Old West to have let the horse thieves and gunslingers hold sway? Would the good people of Brazil be better off today if they did not act, but waited for legal processes to grind slowly against each individual crime among the thousands of crimes? We don't have to endorse vigilantism in general to see that there are circumstances in which it is better than the alternatives. In a normal civilized setting, of course, it is not.

12. Finally, popular justice can be an alternative to corrupt institutions. Historian Otto Scott refers to a source that says that when counties were organized they were descended upon by a wolf-pack of dishonest officials. "Vigilantes arose," Scott says, "to put down crooked authorities." The most graphic example of this came in Bannack, Montana, in 1863 when a gang of stagecoach bandits got their leader, Henry Plummer, elected sheriff. This led, Caughey tell us, to a hundred (!) murders committed during the robberies that followed. The vigilante movement in Montana sprang up to hang Plummer and others like him.[3]

The simultaneous weakness and undue power of legal institutions in the United States today. In an excellent article in the July 1994 *Chronicles*, Samuel Francis writes of "anarcho-tyranny." By this, he means "the combination of oppressive government power against the innocent and the law-abiding and, simultaneously, a grotesque paralysis of the ability or the will to use that power to carry out basic public duties such as protection of public safety." The point he makes is one that I made (although the title doesn't directly suggest it) in my article "Affirmation and Distrust: The Growing Polarity Within American Conservatism" in the July/August 1993 *Conservative Review*.

These are not new developments. I have been witness to them during all of the 36 years since my graduation from law school. They appear, however, to be becoming worse. The government's excess of power, put into effect largely through its legal institutions, is apparent in its countless interventions into normal productive life through such things as the wetlands regulations, the Americans with Disabilities Act, and the attempt to turn a vast array of human relationships into justiciable matter--to name just a few.

American law is at the same time at least semi-impotent in the performance of its basic functions. As I note the ways this emasculation appears, it will help to keep at least the virtues of "popular justice" in mind as something of a yardstick, since, despite all of vigilantism's faults, these virtues embody directness and energy, the very opposite of impotence.

1. First, note the element of delay. As already mentioned, delay dilutes retribution and deterrence, and introduces injustices of its own. A New York Times News Service article on February 27, 1994, reported that "experienced death penalty defense lawyers said in interviews that it should not be uncommon to file 50 to 100 pretrial motions in such cases." Those are just the *pretrial* motions; so far as *post-trial* delays are concerned, it took the state of Illinois *fourteen years* to execute John Wayne Gacy after his March 1980 conviction of 33 murders. Although not directly pertinent to delay, some facts about the case are worth noting: "The victims were killed between 1972 and 1978," a press report says. "Many were handcuffed and repeatedly raped. Most were strangled after Gacy tricked them into allowing him to slip a rope around their necks, then slowly twisted it tighter and tighter with a stick." He enjoyed a "last meal of fried chicken, fried shrimp, french fries and fresh strawberries." It is worth noting that "relatives of Gacy's victims, barred from the execution chamber by state prison officials, maintained a tense vigil waiting for word of his death." We see that they were completely marginalized by the process.[4]

2. We are witness to a rampant failure to protect society, with known criminals allowed to run loose to commit additional crimes. In Wichita, Kansas, where I live, a newspaper report on August 30, 1992, said that "a 34-year-old man considered a 'viable suspect' in a series of rapes this summer in the College Hill area was arrested Saturday...after he allegedly burglarized a house...and fled in the homeowner's car." The man had been "sent to prison in August 1988 after being charged with one count of rape and five counts of aggravated robbery...His parole date was unknown." A newspaper story on June 26, 1993, told how a member of one of Wichita's gangs showed up at a rural home and threatened to shoot a 12-year-old boy at the house. When the parents sought protection they were told "that Butler County law enforcement officers were limited in their ability to arrest minors because the county doesn't have a juvenile detention facility." A report in the *Wichita Eagle* on September 30, 1993, tells how a jealous ex-boyfriend came into a Burger King and shot a young woman to death. He was "out of jail on bail after torturing and raping" the woman. A local judge had let him out for a mere $250. When later the woman had called police for help after he had phoned her, she was told that "we can't watch over everybody who gets a threatening call." An editorial on January 3, 1994, says "violent spouse abusers are arrested and released again and again,...warrants for their arrest can go many months without being served because officers don't have the time to even try to find them, [and] juveniles can pile up lengthy arrest records with impunity." Three days later, on January 6, a news article said that "Wichita's young criminals quickly learn they can go through the system as many as five times and end up on probation." On the 17th of the same month the paper reported that a drunk driver who had killed a man "has disappeared, exactly as Mandina's family warned he would when authorities did not set a bond high enough to keep him in jail...'It's a joke the way the justice system is,' said one family member who asked that her name not be used. 'We are not happy with it.'" Then on March 19, 1994, the paper told how a 21-year-old gang member wouldn't be charged for killing a rival gang member because "it was self-defense." The one who is not being charged is nevertheless in jail, but there is even a lesson in that: his incarceration is "because of $50,000 in bonds that have accumulated as

he has not appeared in Municipal Court on more than two dozen misdemeanor cases, some of which were weapons violations."[5]

If this is what is produced by a regularized system of "mediated justice" today, popular justice must indeed be horrible to be worse. The cases represent a profound failure by government to protect lives and property. It is possible, too, that they speak of a situation in which the tide of barbarism is so high that it cannot be addressed without enormous resources being poured into police, courts and prisons. To address it fully means a police state, with the potential horrors that are attendant upon it.

3. This failure to protect has risen to the level of authorities' not even responding to many reports of crime. Writing in *Chronicles*, Roger D. McGrath says that in Los Angeles "cars are stolen so often (nearly 200 a day) that the LAPD does nothing more than list the vehicle on a 'hot sheet' and wish the victim good luck. Korean merchants complain that customers brazenly walk out of their stores without paying for merchandise because they know that the police will not respond to a call for help. The police are simply overwhelmed by the volume of crime...."[6]

4. Criminals are sometimes let off on technicalities arising entirely out of the inefficiencies of the system. The Wichita paper on May 6, 1994, quoted a driver as saying "I'm going about 20 and this guy comes up behind me and starts riding me real close...As I'm getting ready to turn, he runs into me...he runs into me again...He hit me about eight times. And when I pulled over, he side-swiped me." The outcome? "After three canceled court hearings, the case was dismissed on March 2. The city prosecutors...dropped it when they realized the damage exceeded $500. That made it a felony, they said, so it had to be filed in District Court. But then county prosecutors said they didn't want to file an old case that had already been filed in city court...' This is exactly why people take things into their own hands,'" [the victim said].[7]

Perhaps the most serious problem in our criminal court system relating to "letting criminals off on a technicality" comes from the "exclusionary rule," which says that evidence becomes inadmissible if it was obtained through a search that was made without a warrant in a situation where there should have been one. The Fourth Amendment protection against illegal searches and seizures is a vitally important limitation on the raw power of government, but violations of it by police and prosecutors could be punished without making the evidence inadmissible. As I write this, there are major questions about whether important evidence in the O. J. Simpson murder case will be barred under the exclusionary rule. The rule is one of the more foolish ever to come from the U. S. Supreme Court: it makes the victims pay for the inadvertencies or unprofessionalism of the police.

5. There is vast recidivism, largely caused by the other abuses. The same criminal commits one serious crime after another, even after being detected. A *Wichita Eagle* report on July 14, 1993, told that an 18-year-old man was shot in the back by a member of a street gang in 1991, then was blinded a year later by a shotgun blast outside his home, but "refused to help police find his attacker." In June 1994 he was himself arrested

"on a domestic violence complaint," but was bailed out by his step-father. Even though blind, he was able to repay his stepfather's kindness by attacking him. "One of [the stepfather's] brown eyeballs, gouged from the socket, lay on the living-room carpet with strands of the optic nerve still attached." Another article on November 19, 1993, told how a drive-by shooting into a crowd attending a birthday party critically injured a 14-year-old. A 17-year-old was arrested and charged. He was out on bail awaiting trial on an aggravated battery charge stemming from another incident. He already had "convictions of eight felonies and three misdemeanors in juvenile court, including four charges of burglary of homes, one charge of aggravated burglary in which he entered a home that was occupied...He also has convictions in juvenile court for theft of handguns, shotguns, rifles, ammunition, electronics, jewelry and coins in connection with the burglaries."[8]

6. The courts often give up trying to fit the punishment to the crime, and this results in a leniency that denies both retribution and deterrence and that seeks only half-heartedly to address even the question of rehabilitation. In a speech on May 16, 1994, U. S. Supreme Court Justice Clarence Thomas asked "what are we telling students who are trying hard to do well in school and to avoid drugs, or the upstanding public housing tenant who respects others' property and well-being, when our law fails to express outrage at those who do wrong?" Earlier in this monograph I told how in Washington state a man's house was burned down, presumably by angry townspeople, when he was released after serving just 18 months of a four-year sentence "for first-degree statutory rape of a 10-year-old girl."[9]

7. More and more, "crime pays." Notoriety translates into money in today's mass-media society. An eye-opening feature by Larry Sutton of the Knight-Ridder News Service on January 3, 1994, cites eight prominent cases. Joey Buffafuoco's sexual relationship with Amy Fisher has led "to three television movies, a book and an alleged $250,000 payoff for chatting on [TV's] 'A Current Affair.'" Lorena Bobbitt, who cut off her husband's penis, "has made David Letterman's Top 10 more than once." Basketball great Wilt Chamberlain made money from his biography in which he told of having sex with 20,000 women. Sidney Bittle Barrows, famous as "The Mayflower Madam," "got a book and a television movie for her troubles, and she now writes an advice column...."[10]

8. This leads again to a point mentioned in other contexts: that the legal system is simply inadequate to address America's civilizational collapse into barbarism. An Op-Ed column by Rowland Nethaway on October 30, 1993, carries the headline "Remorseless Kids Are National Disaster." He told of a case in Irving, Texas, where "a young teenage girl greeted a pizza deliveryman with a blast of hair spray into his eyes. The girl's three teenaged companions then...hog-tied, blindfolded, kicked and beat" him. They joked about exploding firecrackers in his nose and ears, but settled for beating him "with boards with protruding nails." Then they stabbed him repeatedly, adding the final touch by slitting his throat. Somehow, he lived. After telling of two other such cases which he read about in the same day's paper, Nethaway says "this is different. There have always been wild and rebellious kids...[But] many of today's youth don't seem to know right from wrong. Children are robbing, maiming and killing on whims, and with no pity and no remorse."[11]

Lessons from "popular justice." If vigilantism and lynching can be considered symptoms of a social disease during the disarray of the seventy years following the Civil War, America's carnage today is similarly a symptom of how far the country's culture has come from a sound moral and legal order. There has been a loss of moral and cultural consensus and of the social pressures that enforced conformity to moral injunctions; and government and legal institutions have been allowed to evolve into a Leviathan that is simultaneously far too strong and far too weak. These things have come about through intellectual and social forces that have attacked the well-springs of civilized society. Unless they contain their own self-curing mechanisms, we cannot hope to overcome the process of dissolution so long as we fail to understand those forces. This monograph has not been the place to analyze them, but it serves to underscore how important the task is.

"Popular justice" points to certain virtues a legal system should have. Law must along with its other qualities be suffused with energy, with dispatch, with a full regard for the civilizational claims of the law-abiding citizen. And it must do its job in a manner that at least roughly approximates its own ideals. It is not likely that there has ever been a golden age of the law during which this has been accomplished, but we can say that until legal institutions come to capture or recapture those virtues, we have little reason to be highly critical of the communities of the nineteenth century whose citizens "took the law into their own hands." In the social crisis in which Americans find ourselves, we will need to work to remedy the decrepitude and venality of regularized justice. The ways to do this are not technically difficult, but there are enormous human obstacles to arriving at a consensus about them and then implementing them.

A larger polarity: the tension between ideals, principles and law, on the one hand, and a universal desire to cut corners and directly to address the realities of life, on the other.

This discussion of lynching has discussed local communities' departure from legal process to enforce their own values where they have found legal institutions unavailable, inadequate or corrupt. Popular justice is also an excellent illustration of a broader phenomenon: the fact that everywhere human beings talk of ideals, excellence, morale, ethics, and law--in other words, of behavior ordered by norms in which people profess to believe--, while in their behavior they often allow themselves to depart from those norms. They do this because for a number of practical reasons satisfactory to themselves they find ideals encumbrances. To the ordinary human being, punctilio is one thing, life in all its vitality another. The effects are sometimes beneficial, sometimes harmful.

As with so much else, examples can be both large and small:

> . The public philosophy of the United States is totally committed to the support of "free speech." The U. S. Supreme Court treats this freedom as among those with the highest priority. And, Constitutional law aside, freedom of inquiry is universally acknowledged as fundamental to both the spirit and the practical pursuit of science, of thought, of research, of academia, and of democratic institutions. Europe and America have a revered intellectual tradition going back

> to Galileo, Milton and Mill of championing the right of free expression, from which all sorts of good is known to be derived.

But how much do people, including the governing elites, *really* believe--"in their gut," to use the graphic colloquialism--that freedom of inquiry is a good thing? At all times and places in history--not excluding the United States in the late twentieth century--significant areas of thought are treated as so taboo, as against what "everybody knows to be true," that "no one dares speak their name." Anyone who even studies those things is thought to commit a moral crime. There are, for example, scientists with the highest credentials who say that intelligence testing shows that the races are not equal in mental ability. They are not met by reasoned argument and counter-evidence, but by vituperation and violence. [This was written before the release of Richard Herrnstein and Charles Murray's *The Bell Curve*. Although that book did incur much vilification, it also elicited much intelligent comment, making the subject of comparative intelligence less apposite an example of my point than it had been earlier.]

There are other issues that aren't quite so taboo, but that don't receive the give-and-take of free inquiry. I have written a series of essays on subjects of that sort, such as the justification for the relocation of the Japanese-Americans from the west coast during World War II. "Political correctness" puts a blanket over these, so that there is no discussion of them.

As to many things, contemporary Americans live on myths that are portioned out to them by the ubiquitous media. This is so even in a society where everybody can tell you how terrible it was that Goebbels was "a master of propaganda" in his manipulation of the German people. Many people think it a virtue to decline to see the propaganda for what it is, and those who do recognize it have minimal ways to be heard. A question of vital significance today, as in every century, is: What is the status of truth and of truth-seeking in our time?

> . Another example is that many institutions are not what they hold themselves out to be. If lip-service to "excellence" were the key to a good education, the American public school system and institutions of higher learning would be the finest in the world. In most American public universities, "mission statements" make constant reference to excellence while at the same time great stress is placed on "retention" of thousands of students who were admitted on an "open admissions" basis and who aren't qualified to do college work.

I was struck by this 40 years ago when I was in the Marine Corps. The Corps' outer *persona* differed immensely from its inner reality. *Esprit de corps*, which the image proclaimed as so important, counted for nothing in the Corps itself, where enlisted men were treated as though they were in the penitentiary. (To point out this abuse is not to diminish in the slightest the sacrifices that so many valiant men have made in the Marine Corps.) Earlier, we saw how the legal profession departs from its ideals. It should be a profession noted for its courage, honesty, and ethics, but the public has good reason not to see it that way today.

. The same thing occurs in everyday life. On the street behind our house, drivers speed by in insouciant disregard of the speed limit. If we were able to talk with those drivers, we would find them ordinary people with all the wonderful qualities, as well as foibles, of people generally.

These and countless other examples testify to the fact that there is a substantial disjunction between ideals and practice at almost all times and places. Religious thinkers have historically been profoundly aware of this, which is why so many have withdrawn into asceticism to maintain their purity.

Is there a solution? Not entirely. To the extent there is, it may come in part through a more subtle formulation of our principles and a continual re-energizing of our ideals. To the extent that they are fit for bumper-sticker sloganeering, which is the way humanity thinks of most of its principles, our ideals are not thought out in a way that would fully lend themselves to people's practical affairs. Considerable work remains to be done within ethics, law and institutional theory to accomplish this subtlety. This is something that every ideologue needs to understand as he deduces conclusions from his limited premises. Our discussion of contemporary legal institutions has shown how greatly they need to be reinvigorated. Much goes under the name of "law"--which we revere in the abstract--, but not all of it deserves equal respect.

Moreover, it will be worthwhile to take our ideals and our often-shallow morality with considerably greater humility than we do, realizing that there is much we don't understand. Shakespeare's "there is more in heaven and earth, Horatio, than is dreamt of in your philosophy" is one of the wisest insights ever expressed. It is worth keeping in mind that the "acting man" may know some things that thinkers have not been able to capture when formulating ideals. This does not amount to a defense of all corner-cutting on ideals, since the effects of that are often harmful; but sometimes the corner-cutting is the only way to "get things done"--and bespeaks of vitality rather than of decadence. During the many years since I left the Marine Corps, for example, I have had occasion to reflect that perhaps those who have led men into combat knew considerably more about what it takes to get young Americans to face the horrors of war than I did. The Corps wasn't what it was idealized to be, but there may (or may not) have been practical reasons for that.

This insight has been directly pertinent to the subject of lynching. We started by knowing that lynching is a horror. We started, too, with a secure knowledge that extralegal justice flies in the face of law and that law commands our respect as the bedrock of civilization. How has it turned out, then, that there has been more to be said? Why have the ordinary people of the American West, the South, of rural Russia, of Brazil marched to a different drummer? It is enough to give us pause about our certainties.

NOTES FOR PART I

1. See *New Republic* editorials: Feb. 2, 1927, p. 289; Jan. 9. 1929, p. 203; Jan. 15, 1930, p. 207; Jan. 7, 1931, p. 202; Nov. 25, 1931, p. 30.

2. See articles "The Historic Dispossession of the American Indian: Did It Violate Our Ideals?," *Journal of Social, Political and Economic Studies*, Fall 1991; "Issues in the American Cultural War: The World War II Relocation of the Japanese-Americans," *Journal of Social, Political and Economic Studies*, Spring 1993; "Kent State Revisited," *Journal of Social, Political and Economic Studies*, Summer 1993; "The Hollywood Blacklist in Historical Context," *Journal of Social, Political and Economic Studies*, Fall 1993; "Sudoplatov's Bombshell: The J. Robert Oppenheimer Case Revisited," *Conservative Review* (a forthcoming summer issue in 1994).

3. Dwight D. Murphey, *Understanding the Modern Predicament* (Washington: University Press of America, 1982).

4. James Elbert Cutler, *Lynch-Law: An Investigation into the History of Lynching in the United States* (Montclair, NJ: Patterson Smith, 1969).

5. Frank Shay, *Judge Lynch: His First Hundred Years* (Montclair, NJ: Patterson Smith, 1938; reprint in 1969), pp. 23-5.

6. Shay, *Judge Lynch*, p. 18.

7. Shay, *Judge Lynch*, p. 19.

8. Cutler, *Lynch-Law*, pp. 36-8, 43.

9. Cutler, *Lynch-Law*, p. 72.

10. Cutler, *Lynch-Law*, p. 79.

11. Cutler, *Lynch-Law*, pp. 86-8.

12. Shay, *Judge Lynch*, pp. 49-51.

13. Cutler, *Lynch-Law*, p. 127.

14. John W. Caughey, *Their Majesties The Mob* (Chicago: University of Chicago Press, 1960), p. 8.

15. Cutler, *Lynch-Law*, p. 134; *Wichita Eagle*, May 27, 1994.

16. Cutler, *Lynch-Law*, p. 151.

17. Cutler, *Lynch-Law*, pp. 151-2, 161, 172, 171, 170, 179-81.

18. Cutler, *Lynch-Law*, pp. 190-1.

19. National Association for the Advancement of Colored People, *Thirty Years of Lynching in the United States, 1889-1918* (New York: Negro Universities Press, 1969), p. 29.

20. Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* (Philadelphia: Temple University Press, 1980), pp. 6, 7.

21. Richard Maxwell Brown, *Strain of Violence* (New York: Oxford University Press, 1975), p. 155.

22. *Wichita Eagle* for July 13, 1993; July 16, 1993; Oct. 23, 1993; National Right to Work *Newsletter*, Oct. 1993.

23. Time-Life Book editors, *The Wild West* (New York: Warner Books, Inc., 1993).

24. Cutler, *Lynch-Law*, p. 180.

25. Caughey, *Their Majesties*, pp. 14, 4.

26. Caughey, *Their Majesties*, pp. 89, 93, 94; Shay, *Judge Lynch*, p. 68.

27. Shay, *Judge Lynch*, p. 68; Brown, *Strain of Violence*, pp. 176, 22, 135-9; Caughey, *Their Majesties*, pp. 62, 63.

28. Brown, *Strain of Violence*, p. 150.

29. Roger D. McGrath, "Treat Them to a Good Dose of Lead," *Chronicles*, Jan. 1994, pp. 16-19.

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2. Cutler, *Lynch-Law*, p. 3.

3. Cutler, *Lynch-Law*, pp. 4, 5.

4. Shay, *Judge Lynch*, p. 17.

5. David Weisburd, *Jewish Settler Violence: Deviance as Social Reaction* (University Park: The Pennsylvania State University Press, 1989), pp. 70, 73, 78, 84; *Wichita Eagle*, Sept. 28, 1993, and Dec. 25, 1993.

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18. Clark, *Since Reconstruction*, p. 303.

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20. Shay, *Judge Lynch*, p. 131.

21. Wright, *Racial Violence in Kentucky*, p. 98.

22. Shay, *Judge Lynch*, pp. 82, 83; Coulter, *During Reconstruction*, p. 50.

23. Grant, *Anti-Lynching Movement*, p. 111.

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25. Zangrando, *NAACP Crusade,* pp. 4, 205; Grant, *Anti-Lynching Movement*, p. x.

26. Raper, *Tragedy*, p. 51; Cutler, *Lynch-Law*, p. 252.

27. See, as to the Ukraine famine, my article "Lest We Forget (or Never Really Know): The 60th Anniversary of Soviet Communism's Deliberate Murder of Millions by Starvation," *Conservative Review*, Oct. 1992, pp. 38-44; *Newsweek*, June 2, 1986; *AIM Report*, August 1993.

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2. The culture of honor is discussed at length in Bertram Wyatt- Brown, *Southern Honor* (New York: Oxford University Press, 1982).

3. *Otto Scott's Compass*, P.O. Box 1769, Murphys, CA 95247, Oct. 1, 1993; Caughey, *Their Majesties*, p. 81.

4. *Wichita Eagle*, Feb. 27, 1994, and May 10, 1994.

5. *Wichita Eagle*, Aug. 30, 1992; June 26, 1993, Sept. 30, 1993, Jan. 3, 1994, Jan. 6, 1994, and Jan. 17, 1994.

6. McGrath article, *Chronicles*, Jan. 1994, p. 18.

7. *Wichita Eagle*, May 6, 1994.

8. *Wichita Eagle*, July 14, 1993, and Nov. 19, 1993.

9. *Human Events*, June 10, 1994; *Wichita Eagle*, July 13, 1993.

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